APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-684
D.C. No. 6:15-cv-1517
District of Oregon, Portland

In re: UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

STATE OF ALABAMA,

Defendant,

XIUHTEZCATL TONATIUH M., through his
Guardian Tamara Roske-Martinez, *et al.*,

Real Parties in Interest,

THE NATIONAL ASSOCIATION OF
MANUFACTURERS, *et al.*,

Intervenors,

ENVIRONMENTAL JUSTICE CLINIC –
UNIVERSITY OF MIAMI SCHOOL OF LAW, *et al.*,

Amici Curiae.

Appendix A

Filed: May 1, 2024

ORDER

Before: BENNETT, R. NELSON, and MILLER, Circuit Judges.

In the underlying case, twenty-one plaintiffs (the Juliana plaintiffs) claim that—by failing to adequately respond to the threat of climate change—the government has violated a putative "right to a stable climate system that can sustain human life." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *1 (D. Or. Dec. 29, 2023). In a prior appeal, we held that the Juliana plaintiffs lack Article III standing to bring such a claim. *Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020). We remanded with instructions to dismiss on that basis. *Id.* The district court nevertheless allowed amendment, and the government again moved to dismiss. The district court denied that motion, and the government petitioned for mandamus seeking to enforce our earlier mandate. We have jurisdiction to consider the petition. *See* 28 U.S.C. § 1651. We grant it.

1. "[M]andamus is an extraordinary remedy . . . reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). "[M]andamus is the appropriate remedy" when

"sought on the ground that the district court failed to follow the appellate court's mandate." *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999); *see also United States v. U.S. Dist. Ct. for S. Dist. of N.Y.*, 334 U.S. 258, 263 (1948). We review a district court's compliance with the mandate de novo. *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010).

2. The petition accuses the district court of failing to execute our mandate on remand. District courts must "act on the mandate of an appellate court, without variance or examination, only execution." *United States v. Garcia-Beltran*, 443 F.3d 1126, 1130 (9th Cir. 2006). "[T]he only step" that a district court can take is "to obey the mandate." *Rogers v. Consol. Rock Prods. Co.*, 114 F.2d 108, 111 (9th Cir. 1940). A district court must "implement both the letter *and the spirit* of the mandate, taking into account the [prior] opinion and the circumstances it embraces." *Pit River Tribe*, 615 F.3d at 1079 (emphasis added) (cleaned up).

3. In the prior appeal, we held that declaratory relief was "not substantially likely to mitigate the plaintiffs' asserted concrete injuries." *Juliana*, 947 F.3d at 1170. To the contrary, it would do nothing "absent further court action," which we held was unavailable. *Id.* We then clearly explained that Article III courts could not "step into the[] shoes" of the political branches to provide the relief the Juliana plaintiffs sought. *Id.* at 1175. Because neither the request for declaratory relief nor the request for injunctive relief was justiciable, we "remand[ed] th[e] case

to the district court with instructions to dismiss for lack of Article III standing." *Id.* Our mandate was to dismiss.

4. The district court gave two reasons for allowing amendment. First, it concluded that amendment was not expressly precluded. Second, it held that intervening authority compelled a different result. We reject each.

The first reason fails because we "remand[ed] . . . with instructions to dismiss for lack of Article III standing." *Id.* Neither the mandate's letter nor its spirit left room for amendment. *See Pit River Tribe*, 615 F.3d at 1079.

The second reason the district court identified was that, in its view, there was an intervening change in the law. District courts are not bound by a mandate when a subsequently decided case changes the law. *In re Molasky*, 843 F.3d 1179, 1184 n.5 (9th Cir. 2016). The case the court identified was *Uzuegbunam v. Preczewski*, which "ask[ed] whether an award of nominal damages by itself can redress a past injury." 141 S. Ct. 792, 796 (2021). Thus, *Uzuegbunam* was a damages case which says nothing about the redressability of declaratory judgments. Damages are a form of retrospective relief. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608–09 (2001). Declaratory relief is prospective. The Juliana plaintiffs do not seek damages but seek only prospective relief. Nothing in *Uzuegbunam* changed the law with respect to prospective relief.

We held that the Juliana plaintiffs lack standing to bring their claims and told the district court to dismiss. *Uzuegbunam* did not change that. The district court is instructed to dismiss the case forthwith for lack of Article III standing, without leave to amend.

PETITION GRANTED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

Civ. No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Filed: May 1, 2024

JUDGMENT

AIKEN, District Judge:

For the reasons set forth in the Court's accompanying Order, this case is DISMISSED.

It is so ORDERED and DATED this 1st day of May 2024.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

Civ. No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Filed: April 19, 2024

SUPPLEMENTAL ORDER ADDRESSING PETITION FOR WRIT OF MANDAMUS

AIKEN, District Judge:

This supplemental order is issued in response to the invitation of the United States Court of Appeals for the Ninth Circuit to address defendants' Petition for Writ of Mandamus ("Pet."), ECF No. 581-1, which is pending before the appellate court, Case No. 24-684.

Appendix C

INTRODUCTION

The young plaintiffs here have compiled an abundance of factual evidence to support their claim that the government has known about the dangers posed by fossil fuel production, and, despite that knowledge, chose to promote production and consumption of coal, oil, and gas at increasing levels over decades. The evidence, as the Ninth Circuit stated, "leaves little basis for denying that climate change is occurring at an increasingly rapid pace . . . and stems from fossil fuel combustion." *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

A case about climate change, to be sure, raises legal issues of first impression, but the matters the district court has addressed time and again throughout the pendency of this case are the bread-and-butter of daily trial court work: injury, causation, and redressability under Article III; justiciability; viability of claims under Federal Rules of Procedure 12(b); standards for injunctive and declaratory relief—foundational inquiries necessary to proceed to any factfinding phase reaching the heart of plaintiffs' novel claims. Plaintiffs note in their response that this is defendants' seventh petition for writ of mandamus. Defendants' petition challenges the district court's order granting leave to amend and denying a motion to dismiss on the pleadings, assigning error to this Court's rulings as one would through the usual appellate process.

As the Ninth Circuit has stated, "[t]here is enduring value in the orderly administration of litigation by the trial courts, free of needless appellate interference. In turn,

appellate review is aided by a developed record and full consideration of issues by the trial courts. If appellate review could be invoked whenever a district court denied a motion to dismiss, we would be quickly overwhelmed with such requests, and the resolution of cases would be unnecessarily delayed." *In re United States*, 884 F.3d 830, 837 (9th Cir. 2018). This Court appreciates its responsibility in the constitutional scheme to develop a record, consider the facts, and faithfully interpret the law. Fulfilling this role will aid the appellate court in its review in the normal course of appeal, the proper vehicle for its analysis of defendants' assignments of error.

BACKGROUND

A factual background relevant to the parties' arguments on defendants' now-pending petition for writ of mandamus is set forth in the district court's Order on defendants' motion to dismiss, ECF No. 565 (December 29, 2023). Otherwise, it has been briefed extensively by the parties. In their petition, defendants assert that this Court violated the Ninth Circuit's mandate in its 2020 decision. This Court highlights portions of the procedural history it finds helpful to recall.

I. 2020 Appellate Court Decision

The Ninth Circuit did not reach the merits of plaintiffs' claims because it found that plaintiffs lacked standing. In the appellate court's 2020 decision, writing for the majority, Judge Hurwitz, joined by Judge Murguia, began with the basics: "To have standing under Article

III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by . . . challenged conduct and (3) is likely redressable by a favorable judicial decision." *Juliana,* 947 F.3d at 1168. (9th Cir. 2020).

Agreeing with the district court, Judge Hurwitz found that "[a]t least some plaintiffs" had claimed "particularized injuries," since climate change threatened to harm certain plaintiffs in "concrete and personal" ways if left unchecked. *Id.* And, that some plaintiffs had also established causation because there was "at least a genuine factual dispute as to whether" U.S. climate policy was a "substantial factor" in exacerbating plaintiffs' climate change-related injuries. *Id.* at 1169. Thus, plaintiffs' standing turned on redressability: "whether the plaintiffs' claimed injuries [were] redressable by an Article III court." *Id.*

Plaintiffs claimed defendants had violated their constitutional right to a climate system capable of sustaining life, and to redress that violation, sought injunctive relief, including an order directing defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO2 to stabilize the climate system." First. Am. Compl. at 94 ¶¶ 2, 6, 7.

"Reluctantly," the panel found such relief "beyond [the district court's] constitutional power." *Juliana*, 947 F.3d at 1165. For injunctive relief, the Ninth Circuit was "skeptical," but assumed without deciding that plaintiffs might show that their injuries could be redressed by an order in their favor. *Id.* at 1171. That said, the appellate

court based its ruling on the second redressability prong, stating that an injunction was "beyond the power of an Article III court to order, design, supervise, or implement." *Id.* The appellate court explained that Article III courts cannot order injunctive relief unless constrained by more "limited and precise" legal standards, discernable in the Constitution, and that plaintiffs must make their case to the political branches. *Id*. at 1175.

As for plaintiffs' request for declaratory relief, the Ninth Circuit determined that a declaration would be "unlikely by itself to remediate [plaintiffs'] alleged injuries." *Juliana* 947 F.3d at 1170. Accordingly, the Ninth Circuit "reverse[d] the certified orders of the district court and remand[ed]" the case "with instructions to dismiss for lack of Article III standing." *Id*. at 1175.

II. 2023 District Court Orders

After the Ninth Circuit ordered the district court to dismiss the case, plaintiffs moved to file a second amended complaint. ECF No. 462. On June 1, 2023, this Court granted plaintiffs' motion to amend their complaint. Order on Second Am. Compl., ECF No. 540 (June 1, 2023). Plaintiffs had notified the Court of an intervening case from the United States Supreme Court, *Uzuegbunam v. Preczewski*, ___U.S.___, 141 S. Ct. 792 (2021) which held that, for purposes of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right. *Id*. at 798, 802. That, with this Court's understanding that the Ninth Circuit had not expressly foreclosed the

possibility of amendment, led the Court to grant plaintiffs' motion to amend. This Court explained:

> "Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings . . . ." *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting Nguyen, 792 F.2d at 1502; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). When mandate in the prior appeal did not expressly address the possibility of amendment and did not indicate a clear intent to deny amendment seeking to raise new issues not decided by the prior appeal, that prior opinion did not purport "to shut the courthouse doors." *San Francisco Herring Ass'n*, 946 F.3d at 574 (citing *Nguyen*, 792 F.2d at 1503).
>
> . . .
>
> "Here, this Court does not take lightly its responsibility under the rule of mandate. Rather, it considers plaintiffs' new factual allegations under the Declaratory Judgment Act, and amended request for relief in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal. Nor did the mandate expressly state that plaintiffs could not amend to replead their case—particularly where the opinion found a

> narrow deficiency with plaintiffs' pleadings on redressability. This Court therefore does not interpret the Ninth Circuit's instructions as mandating it "to shut the courthouse doors" on plaintiffs' case where they present newly amended allegations. *San Francisco Herring Ass'n*, 946 F.3d at 574.

ECF No. 540 at 10-11.

Defendants quickly moved to dismiss plaintiffs' second amended complaint, ECF No. 547, and this Court denied defendants' motion. Order on Mot. to Dismiss, ECF No. 565 (December 29, 2023). Defendant had again asserted that the district court had violated the rule of mandate and this Court again explained its due regard for the rule:

> Because it is jurisdictional error to contravene a rule of mandate, the Court duly reconsiders the mandate of the Ninth Circuit and does not take the matter lightly. "A district court that has received the mandate of an appellate court cannot vary or examine that mandate for any purpose other than executing it." *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). "Violation of the rule of mandate is a jurisdictional error." *Id*. at 1067.
>
> "But while the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the district court any issue not

expressly or impliedly disposed of on appeal." *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986)). In determining which matters fall within the compass of a mandate, "[d]istrict courts must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999) (as amended) (quoting *Delgrosso v. Spang & Co.*, 903 F.2d 234, 240 (3d Cir. 1990)).

"Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings . . . " *S.F. Herring*, 946 F.3d at 574 (quoting *Nguyen*, 792 F.2d at 1502); *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). When the mandate in the prior appeal does not expressly address the possibility of amendment and does not indicate a clear intent to deny amendment seeking to raise new issues not decided, that mandate does not purport "to shut the courthouse doors." *S.F. Herring*, 946 F.3d at 574.

In *S.F. Herring*, the Ninth Circuit discussed its mandate in a prior appeal, which vacated the district court's order entering summary judgment in the defendants' favor and directed

the district court to dismiss the complaint. *See S.F. Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (vacating judgment and remanding case with instructions to dismiss for lack of subject matter jurisdiction). On remand, the district court allowed the plaintiff to file a second amended complaint.

In the later appeal, the Ninth Circuit determined that the district court correctly found that the earlier mandate to dismiss did not prevent the plaintiff from seeking leave to re-plead. *S.F. Herring*, 946 F.3d at 574. The appellate court reasoned that in instructing the district court to dismiss, the mandate was silent on whether dismissal should be with or without leave to amend, and the mandate therefore did not preclude the district court from allowing plaintiff to file amended pleadings. *Id.* at 572-574.

When this Court granted plaintiffs' motion for leave to amend, it "consider[ed] plaintiffs' new factual allegations under the Declaratory Judgment Act and plaintiffs' amended request for relief, in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334, at *5 (D. Or. June 1, 2023).

> The Court once again finds that the Ninth Circuit's mandate did not address whether amendment, if permitted, would cure the deficiency it identified in plaintiffs' complaint. The Ninth Circuit also did not instruct the Court to dismiss without leave to amend. Accordingly, its mandate to dismiss did not foreclose that opportunity, and the Court, on reconsideration, finds that in permitting plaintiffs to proceed with their second amended complaint, the rule of mandate is not contravened. *S.F. Herring*, 946 F.3d at 574; *see also Creech v. Tewalt*, 84 F.4th 777, 783 (9th Cir. 2023) (where appellate court remanded and stated that plaintiff should have leave to amend, district court did not violate rule of mandate by dismissing without leave to amend, because appellate court did not expressly foreclose that option).

ECF No. 565 at 19-20.

On February 2, 2023, defendants filed notice with the district court of their petition for writ of mandamus in the Ninth Circuit. Pet., ECF No. 585, 585-1. Defendants contend that the Ninth Circuit should issue a writ of mandamus to this Court, directing it to dismiss this case for lack of jurisdiction and without leave to amend. The Ninth Circuit invited the district court to address the petition.

Appendix C

LEGAL STANDARD

"The writ of mandamus is a drastic and extraordinary remedy reserved for really extraordinary causes." *In re Van Dusen*, 654 F.3d 838, 840 (9th Cir. 2011) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)) (internal quotation marks omitted). "[O]nly exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004) (internal quotation marks and citations omitted).

In considering whether to grant a writ of mandamus, appellate courts are guided by the five factors identified in *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650 (9th Cir. 1977): (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156 (9th Cir. 2010) (citing *Bauman*, 557 F.2d at 654-55). "All factors are not relevant in every case and the factors may point in different directions in any one case." *Christensen v. U.S. Dist. Ct.*, 844 F.2d 694, 697 (9th Cir. 1988).

Appendix C

DISCUSSION

Defendants maintain that mandamus is warranted because (1) the district court violated the Ninth Circuit's mandate which required dismissal and foreclosed amendment; (2) the district court erred in finding that plaintiffs have Article III standing; and (3) the district court erred in finding that plaintiffs had stated plausible claims for relief under due process clause and public trust doctrine.

I. Standing & Merits

This Court has addressed the merits of the parties' arguments on Article III standing and the viability of plaintiffs' due process and public trust claims, and as before, "stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be best served by further factual development at trial." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018); *see also* ECF No. 565 at 21-34 (discussing redressability for purposes of Article III standing), *id.* at 35-36 (discussing the political question doctrine and justiciability), *id.* at 36-44 (discussing plaintiffs' due process claim), *id.* at 46-48 (discussing plaintiffs' public trust claim and incorporating analysis from prior orders).

As in their motion to dismiss, defendants maintain that the relief plaintiffs seek is "sweeping" and "unprecedented" and that plaintiffs must make their demands to the political branches. *See* Pet. For Writ of Mandamus ("Pet.")

at 1, Doc. 585-1. In any case over which trial courts have jurisdiction, where the plaintiffs have stated a legal claim, it is the proper and peculiar province of the courts to impartially find facts, faithfully interpret and apply the law, and render reasoned judgment. *See* The Federalist No. 78 (Alexander Hamilton).

As this Court stated in its 2023 Order denying defendants' motion to dismiss, "[t]he judiciary is capable and duty-bound to provide redress for the irreparable harm government fossil fuel promotion has caused." ECF No. 565 at 6. This Court draws from that 49-page Order to answer why the remedies plaintiffs seek are not "sweeping" or "unprecedented." In its Order, this Court explained why plaintiffs' proposed remedy is one typical for a district court to fashion and over which it can provide jurisdictional oversight while the parties implement the plans, practices, and policies they together devise. *Id.* at 31-34. As to the merits of plaintiffs constitutional and public trust doctrine claims, the assignments of errors defendants raise in their petition are better suited to an appeal in the regular course.

II. Propriety of Writ of Mandamus

This Court maintains, as do plaintiffs and amici, that the issues defendants raise on mandamus are better addressed through the ordinary course of litigation.

The first *Bauman* factor is whether the petitioner will "ha[ve] no other means . . . to obtain the desired relief." *Perry*, 591 F.3d at 1156. This factor ensures that a writ

of mandamus will not "be used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (internal citation omitted).

Defendants argue that a writ of mandamus is the only means to ensure that the district court complies with the Ninth Circuit's 2020 decision holding that plaintiffs' claims are beyond the judicial power to redress. Pet. at 29. That said, the Court has explained that its Orders duly regarded and complied with the Ninth Circuit's decision and found plaintiffs' amended complaint demonstrated redress was within the district court's constitutional authority. ECF No. 540 at 14-18; ECF No. 565 at 28-34. Further, challenges to standing "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." *Wood v. City of San Diego*, 678 F.3d 1075, 1082 (9th Cir. 2012) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006)). Therefore, defendants' argument that it has no other means to raise a challenge based on redressability—an element of standing—does not succeed.

The second *Bauman* factor is whether the petitioner "will be damaged or prejudiced in any way not correctable on appeal." *Perry*, 591 F.3d at 1156. To satisfy this factor, the defendants "must demonstrate some burden . . . other than the mere cost and delay that are the regrettable, yet normal, features of our imperfect legal system." *DeGeorge v. U.S. Dist. Ct.*, 219 F.3d 930, 935 (9th Cir. 2000) (alteration in original) (quoting *Calderon v. U.S. Dist. Ct.*, 163 F.3d 530, 535 (9th Cir. 1998) (en banc)). Prejudice

serious enough to warrant mandamus relief "includes situations in which one's 'claim will obviously be moot by the time an appeal is possible,' or in which one 'will not have the ability to appeal.'" *Id.* (quoting *Calderon*, 163 F.3d at 535).

Defendants argue that holding a trial on the plaintiffs' claims threatens the separation of powers and flouts the Ninth Circuit's mandate. To the extent that defendants are asserting that executive branch officials and agencies in general should not be burdened by an unmeritorious lawsuit, "Congress has not exempted the government from the normal rules of appellate procedure, which anticipate that sometimes defendants will incur burdens of litigating cases that lack merit but still must wait for the normal appeals process to contest rulings against them." *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018).

"The first two criteria articulated in *Bauman* are designed to [ensure] that mandamus, rather than some other form of relief, is the appropriate remedy." *In re Cement Antitrust Litig. (MDL No. 296)*, 688 F.2d 1297, 1301 (9th Cir. 1982), *aff'd sub nom. Arizona v. U.S. Dist. Ct.*, 459 U.S. 1191 (1983) (mem.). This Court's determination that the mandate did not foreclose dismissal is a legal conclusion, along with the district court's determinations on the plausibility of plaintiffs' claims under Federal Rules of Civil Procedure 12(b)(1) and (6), and those determinations, if in error, are correctable through the ordinary course of litigation. In this Court's view, defendants have not satisfied the second *Bauman* factor.

The third *Bauman* factor is whether the district court's order "is clearly erroneous as a matter of law." *Perry*, 591 F.3d at 1156. Appellate review of that factor "is significantly deferential and . . . is not met unless the reviewing court is left with a definite and firm conviction that a mistake has been committed." *In re Bundy*, 840 F.3d 1034, 1041 (9th Cir. 2016) (quoting *In re United States*, 791 F.3d 945, 955 (9th Cir. 2015)). "The absence of controlling precedent weighs strongly against a finding of clear error [for mandamus purposes]." *In re Van Dusen*, 654 F.3d 838, 845 (9th Cir. 2011).

Here, this Court provided authority from the Ninth Circuit in support of its determination that it had not violated the rule of mandate. See ECF No. 540 at 10-11, ECF No. 565 19-20. The Court also thoroughly analyzed plaintiffs' claims on the merits, as described above (p. 9). Defendants do not put forth any other controlling Ninth Circuit authority on any of the theories asserted by plaintiffs. Defendants argue that the theories are unprecedented. Thus, the lack of controlling precedent here weighs strongly against a finding of clear error. *Id*.

The fourth *Bauman* factor is whether the district court's order is "an oft repeated error or manifests a persistent disregard of the federal rules." *Perry*, 591 F.3d at 1156. This Court finds no oft-repeated error here, and defendants do not contend that the district court violated any federal rule. The defendants do not satisfy the fourth factor.

The final factor is whether the district court's order "raises new and important problems or issues of first

impression." *Perry*, 591 F.3d at 1156. The Ninth Circuit has relied on this factor when there is a "novel and important question" that "may repeatedly evade review." *Id.* at 1159; *see also In re Cement Antitrust Litig.*, 688 F.2d at 1304–05 ("[A]n important question of first impression will evade review unless it is considered under our supervisory mandamus authority. Moreover, that question may continue to evade review in other cases as well.").

As this Court has found, the legal theories asserted raise issues of first impression—i.e., existence of federal public trust doctrine and whether the right to a climate that can sustain human life is fundamental under the Constitution. The merits of those claims are suitable for appeal after final judgment. Whether a district court may grant leave to amend a complaint after a reviewing court orders dismissal is not a matter of first impression, as discussed in this Court's prior orders. *See* ECF No. 540 at 9-11; ECF No. 565 at 18-21. Accordingly, this Court's order granting amendment and denying a motion to dismiss on the pleadings does not present the possibility that those issues will evade appellate review. In this Court's view, defendants have not satisfied the fifth *Bauman* factor. Under the test, a writ of mandamus is not necessary.

III. Staying Litigation

Defendants also ask the Ninth Circuit to stay litigation while deciding their petition for writ of mandamus. Defendants have moved to stay litigation several times and have filed multiple petitions for writ of mandamus. ECF Nos. 177, 308, 365, 390, 420, 585. In this iteration,

defendants maintain that the case must be stayed because there is a substantial likelihood that the Ninth Circuit will grant their petition. Pet. at 5-6. Defendants have not met their burden to show the petition for writ of mandamus is warranted or likely to be granted. The Court has analyzed the appropriate factors and finds that a stay should not be granted.

CONCLUSION

This Court has great regard for the judicial process. It has deliberately considered all motions the parties brought, and its decisions are accessible for appellate scrutiny in the due course of litigation. Trial courts across the country address complex cases involving similar jurisdictional, evidentiary, and legal questions as those presented here without resorting to interlocutory appeal or petitioning for a writ of mandamus. As Justice Stewart noted, "the proper place for the trial is in the trial court, not here." *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Stewart, J., concurring.) Defendants therefore have other means, such as a direct appeal, to obtain the desired relief. This Court recommends denying defendants' petition for writ of mandamus.

SUPPLEMENTAL ORDER DATED this 19th day of April 2024.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX D

2023 WL 9023339

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE DIVISION

Civ. No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

Signed: December 29, 2023

OPINION AND ORDER

AIKEN, District Judge:

In 2015, twenty-one plaintiffs—a group of young people, including "future generations"—brought this civil rights action against the federal government, alleging injury from the devastation of climate change and contending that the Constitution guarantees the

right to a stable climate system that can sustain human life. Through the years of litigating this case, plaintiffs maintain that their government, by subsidizing fossil fuel extraction and consumption, is responsible for destroying the climate system on which all life, liberty, and property depends, violating plaintiffs' fundamental rights under the Due Process Clause of the Constitution and the historical public trust doctrine. On June 1, 2023, the Court granted plaintiffs' motion to file a second amended complaint.

Now before the Court is defendants' motion to dismiss the second amended complaint. ECF No. 547. For the reasons explained, the Court DENIES defendants' motion to dismiss, ECF No. 547; DENIES defendants' motion for an order certifying its prior order, ECF No. 540, for interlocutory appeal, ECF No. 551; and DENIES defendants' motion to stay litigation, ECF No. 552. The Court GRANTS plaintiffs' motion to set a pretrial conference, ECF No. 543.

INTRODUCTION

The parties do not disagree that the climate crisis threatens our ability to survive on planet Earth. This catastrophe is *the* great emergency of our time and compels urgent action.[1] As this lawsuit demonstrates,

1. *See* David Wallace-Wells, The Uninhabitable Earth: Life After Warming (2019); Andrew Freedman & Jason Samenow, *Humidity and Heat Extremes Are on the Verge of Exceeding Limits of Human Survivability, Study Finds*, Washington Post (May 8, 2020) (reporting study warning that highly populated regions of the world will be rendered uninhabitable sooner than

young people—too young to vote and effect change through the political process—are exercising the institutional procedure available to plead with their government to change course. While facts remain to be proved, lawsuits like this highlight young people's despair with the drawn-out pace of the unhurried, inchmeal, bureaucratic response to our most dire emergency. Top elected officials have declared that the climate emergency spells out "code red for humanity."[2] Burning fossil fuels changes the climate more than any other human activity.[3] The government does not deny that it has promoted fossil fuel combustion through subsidies; tax exemptions; permits for fossil fuel development projects; leases on federal lands and offshore areas; permits for imports and exports; and permits for energy facilities.[4] Despite many

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previously thought for parts of the year); Nafeez Ahmed, *New Report Suggests 'High Likelihood of Human Civilization Coming to an End' Starting in 2050*, VICE (June 3, 2019).

2. President Joseph Biden, Remarks on "Actions to Tackle the Climate Crisis" at Brayton Point Power Station, Somerset, Massachusetts (July 20, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/07/20/remarks-by-president-biden-on-actions-to-tackle-the-climate-crisis/ [https://perma.cc/LU2U-CTFM].

3. Environmental Protection Agency, Sec. Environmental Topics, Climate Change, *Causes of Climate Change*, (last updated April 25, 2023), https://www.epa.gov/climatechange-science/causes-climate-change [https://perma.cc/UGU4-B6EF].

4. *Juliana v. United States*, 947 F.3d 1159, 1167 (9th Cir. 2020) ("The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.").

climate change suits around the country, in 2023, the United States witnessed record-breaking levels of oil and gas production.[5] And recent calculations conservatively estimate that the United States provides the oil and gas industry $20,000,000,000.00 annually in an array of subsidies.[6]

Defendants maintain that, because tackling the climate crisis is complex, and no single remedy may *entirely* redress plaintiffs' harms caused by climate change, the judiciary is constrained by the Constitution from offering any redress at all. *See* defs.' mot. to dismiss ("Mot.") at 11-13. Defendants contend that the issue of climate change is political in its nature, and that redress of plaintiffs' alleged injuries must be sought from Congress. *Id.* at 28. That unnecessarily narrow view overlooks one clear and constitutional path to shielding future generations from impacts of the onslaught of environmental disaster: that

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5. *Energy Poverty Prevention and Accountability Act of 2023: Hearing on H.R.6474 and H.R.6481 before the H. Nat. Resources Subcomm. on Energy and Min. Resources, 118th Cong.* (statement of J. Mijin Cha, Assistant Professor, Univ. of Cal.) (citing Oliver Milman, "*US Oil and Gas Production Set to Break Record in 2023 despite UN Climate Goals*," The Guardian, November 27, 2023, sec. Environment, https://www.theguardian.com/environment/2023/nov/27/us-oil-gas-record-fossil-fuels-cop28-united-nations [https://perma.cc/VJ4C-KZGH]).

6. *Id.* (Statement of J. Mijin Cha) (citing Environmental and Energy Study Institute, Fact Sheet, *"Proposals to Reduce Fossil Fuel Subsidies (2021),"* (July 23, 2021)) https://www.eesi.org/papers/view/fact-sheet-proposals-to-reduce-fossil-fuel-subsidies-2021 [https://perma.cc/SD8B-7P6B].

it is the responsibility of the judiciary to declare the law that the government may not deprive the People of their Constitutional guarantee of the God-given right to life. U.S. Const. art III; U.S. Const. amend. V; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

Plaintiffs' allegations are that collective resolve at every level and in every branch of government is critical to reducing fossil fuel emissions and vital to combating climate change. That curbing climate change requires an all-hands-on-deck approach does not oust the Court from its province or discharge it of its duty under the Constitution to say what the law is. *Marbury* 5 U.S. at 170.[7] Combatting climate change may require all to act in accord, but that does not mean that the courts must "throw up [our] hands" in defeat. *See Juliana v. United States*, 947 F.3d 1159, 1175 (9th Cir. 2020) (Staton, J., dissenting).

The legislative and executive branches of government wield constitutional powers entrusted to those branches by the People through the democratic process. *See* U.S. Const. art. I and art. II. So too, as part of a coequal branch of government, the Court cannot shrink from its role to decide on the rights of the individuals duly presenting their case and controversy. *Marbury*, 5 U.S. at 170. Indeed, courts at home and abroad are capably grappling with

7. *See also* Edith M. Lederer, *UN Chief: World Must Prevent Runaway Climate Change by 2020*, Associated Press News (Sept. 10, 2018) (describing massive decarbonization effort necessary to avoid climate "tipping points."), https://apnews.com/article/floods-united-nations-antonio-guterres-us-news-climate-71ab1abf44c14605bf2dda29d6b5ebcc [https://perma.cc/84E6-D24C].

climate change lawsuits seeking redress against both government and private actors on a range of legal theories, many novel.[8] In Montana, Judge Kathy Seeley presided over the first climate change trial in the United States, piercing through expert testimony and scientific evidence to provide factual findings and conclusions of law, ruling that the state's failure to consider climate change when approving fossil fuel projects was unconstitutional. *See Held v. Montana*, Findings of Fact, Conclusions of Law, and Order, Civil Action CDV-2020-307 (Mont. First Jud. D. Ct. Lewis and Clark County, Aug. 14, 2023).

The judiciary is capable and duty-bound to provide redress for the irreparable harm government fossil fuel promotion has caused. Legal scholar and professor Mary Christina Wood contends that the all-encompassing breadth of ongoing "irreparable harm" sets the climate emergency apart from any other crisis, in terms of the human interests at stake.[9] As Professor Wood eloquently states: "Because no crisis is as ominous, imminent, and far reaching, the climate emergency must be considered

8. The Sabin Center for Climate Change Law of Columbia University has assembled for public access the "Climate Change Litigation Database" containing summaries and court dockets for climate change lawsuits brought in the United States and abroad. *Climate Change Litigation Databases,* Colum. L. Sch.: Sabin Ctr. For Climate Change L., https://climatecasechart.com/ [https://perma.cc/B89Z-YN4M].

9. Mary C. Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, 97 Ind. L.J. 239, 249 (2022) (hereinafter "Wood, *Eve of Destruction*").

sui generis," that is, "in a class of its own."[10] The legal approach must "rise to the emergency rather than repeat a failed past paradigm."[11] In the context of Australian youth's challenge to government approval of a coal mine, Justice Bromberg wrote that failure to curb climate change is "what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next."[12]

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10. *Id.*

11. *Id.*

12. *Sharma v. Minister for the Env't* [2021] FCA 560 1, 90 (27 May 2021) (Austl.). The court stated:

> "It is difficult to characterise in a single phrase the devastation that the plausible evidence presented in this proceeding forecasts for the Children. As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience—quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper—all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next."

Id.

Some may balk at the Court's approach as errant or unmeasured,[13] but more likely than not, future generations may look back to this hour and say that the judiciary failed to measure up at all. In any case over which trial courts have jurisdiction, where the plaintiffs have stated a legal claim, it is the proper and peculiar province of the courts to impartially find facts, faithfully interpret and apply the law, and render reasoned judgment.[14] Such is the case here.

BACKGROUND

I. Plaintiffs' Lawsuit

In 2015, plaintiffs filed this civil rights lawsuit that journalists later coined "The Biggest Case on the Planet."[15] At the start of this case, the twenty-one

13. *Juliana v. United States*, 947 F.3d 1159, 1174 (9th Cir. 2020) ("Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not confer the power of 'a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness'; rather, we are bound 'to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.' ") (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 141 (1921)).

14. *See* The Federalist No. 78 (Alexander Hamilton).

15. Laura Parker, *"Biggest Case on the Planet" Pits Kids v. Climate Change*, Nat'l Geographic (Nov. 9, 2018), https://www.nationalgeographic.com/science/article/kids-sue-us-government-climate-change [https://perma.cc/2J7J-74C2].

plaintiffs were between the ages of eight and nineteen. They brought suit along with "future generations" through their guardian, Dr. James Hansen. Plaintiffs named as defendants all federal agencies that plaintiffs alleged were responsible for the U.S. energy policy, including the Department of Agriculture, Department of Transportation, Environmental Protection Agency, Department of Interior, the State Department, Council on Environmental Quality, Department of Defense, and Department of Commerce. Compl., ECF No. 1; First Am. Compl. ("FAC"), ECF No. 7.

Plaintiffs compiled an abundance of factual evidence to support their claim that the government has known about the dangers posed by fossil fuel production, and, despite that knowledge, chose to promote production and consumption of coal, oil, and gas at increasing levels over decades. The record is extensive. The evidence, as the Ninth Circuit stated, "leaves little basis for denying that climate change is occurring at an increasingly rapid pace ... and stems from fossil fuel combustion." *Juliana*, 947 F.3d at 1166.

From the beginning, plaintiffs alleged that, as early as the year 1899, scientists understood that CO_2 concentration in the atmosphere caused heat retention, global heating, and climate change. FAC ¶ 131. Plaintiffs stated that for over fifty years, the United States of America has known that CO_2 pollution from burning fossil fuels was causing global warming and dangerous climate change, and that continuing to burn fossil fuels would destabilize the climate system on which present and

future generations of our nation depend for survival. *Id.* ¶¶ 132-35. Recounting over a dozen signpost junctures, plaintiffs provide letters, memoranda, and reports to the political branches from scientific experts and government agencies cautioning about the danger of carbon pollution and warning that a lack of action would be felt for decades. *Id.* ¶¶ 136-50.

Defendants moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) for lack of standing; failure to state a cognizable constitutional claim; and failure to state a claim on a public trust theory. ECF No. 27. The Court denied that motion in November 2016. *See* Nov. 10, 2016 Op. & Order, ECF No. 83. Defendants also moved for judgment on the pleadings and summary judgment. ECF Nos. 195, 207. For the most part, the Court denied those motions.

When the Court denied defendants' motions to certify its dispositive orders for interlocutory appeal, defendants petitioned the Supreme Court for a writ of mandamus, ECF No. 390-1, and to stay proceedings, ECF No. 391-1, both which were denied. Defendants asked the district court to reconsider certifying its orders for interlocutory appeal, and, that time, the Ninth Circuit invited the district court to do so. *See* Nov. 21, 2018 Order, ECF Nos. 444, 445. Defendants then sought permission to appeal, which the Ninth Circuit granted. Filed Ord., *Juliana v. United States*, No. 18-36082 (9th Cir. Dec. 26, 2018).

On January 17, 2020, a divided panel of the Ninth Circuit issued a decision reversing the district court's

certified orders and remanding the case with instructions to dismiss for lack of Article III standing. *Juliana*, 947 F.3d at 1175. Writing for the majority, Judge Hurwitz, joined by Judge Murguia, began with the basics: "To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by ... challenged conduct and (3) is likely redressable by a favorable judicial decision." *Id.* at 1168.

Agreeing with the district court, Judge Hurwitz found that "[a]t least some plaintiffs" had claimed "particularized injuries," since climate change threatened to harm certain plaintiffs in "concrete and personal" ways if left unchecked. *Id.* The appellate court described the dire circumstances faced by one plaintiff who had had to evacuate his coastal home because of climate change. *Id.* And some plaintiffs had also established causation because there was "at least a genuine factual dispute as to whether" U.S. climate policy was a "substantial factor" in exacerbating plaintiffs' climate change-related injuries. *Id.* at 1169. Thus, plaintiffs' standing turned on redressability: "whether the plaintiffs' claimed injuries [were] redressable by an Article III court." *Id.*

Plaintiffs claimed defendants had violated their constitutional right to a climate system capable of sustaining life, and to redress that violation, sought injunctive relief, including an order directing defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 to stabilize the climate system." FAC at 94 ¶¶ 2, 6, 7.

"Reluctantly," the panel found such relief "beyond [the district court's] constitutional power." *Juliana*, 947 F.3d at 1165. To establish redressability, the appellate court explained, plaintiffs must have identified relief that was both "(1) substantially likely to redress their injuries" and "(2) within the district court's power to award." *Id.* at 1170. On the first prong, the panel found that plaintiffs' own experts had stated that only a comprehensive, government-led plan to reduce U.S. greenhouse gas emissions could mitigate "the global consequences of climate change" and thereby bring plaintiffs' total redress. *Id.* Turning to the second prong, the panel found that supervising such a plan "would necessarily require" judges to make "a host of complex policy decisions." *Id.* at 1171.

Plaintiffs told the appellate court that even partial relief would suffice to redress their injuries, and that the district court "need not itself make policy decisions," because if plaintiffs' request for a remedial plan were granted, the political branches "could decide what policies" would be best to "draw down excess atmospheric CO_2." *Id.* at 1172. But the panel determined that, "even under such a scenario," the district court would need to pass judgment on the sufficiency of the government's response to the order. In the Ninth Circuit's view, a district court could not engage in passing judgment on the sufficiency of the government's response to a court order, because it "necessarily would entail a broad range of policymaking." *Id.*

The panel continued: "[A] constitutional directive or legal standard[ ] must guide the court's exercise of

equitable power," and, on the other hand, "limited and precise" legal rules simply could not resolve the range of policy-related questions plaintiffs' claims raised. *Id.* at 1173. The appellate court determined that no remedy subject to limited and precise definition could redress plaintiffs' injuries and therefore issuing such relief was not within the district court's power. *Id.*

Judge Josephine L. Staton dissented. "Plaintiffs bring suit," she lamented, "to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction." *Id.* at 1175. In Judge Staton's view, the district court had the power to award plaintiffs' relief unless plaintiffs' claims ran afoul of the political question doctrine. *See id.* at 1184-85. Since plaintiffs' claims did not pose political questions, she continued, they should have proceeded. *Id.* at 1185-86. "[O]ur history is no stranger to widespread, programmatic changes ... ushered in by the judiciary[ ]," Judge Staton concluded, and the "slow churn" of institutional-reform litigation "should not dissuade us here." *Id.* at 1188-89. At end of the day, the narrower understanding prevailed: that Article III courts cannot order injunctive relief unless constrained by more "limited and precise" legal standards, discernable in the Constitution, and that plaintiffs must make their case to the political branches. *Id.* at 1175. The Ninth Circuit "reverse[d] the certified orders of the district court and remand[ed]" the case "with instructions to dismiss for lack of Article III standing." *Id.*

Plaintiffs moved to file an amended complaint, removing from their prayer for relief the injunction that

the Ninth Circuit had found objectionable. ECF No. 462. The Court granted it because (1) the Ninth Circuit did not foreclose the possibility of amendment when it mandated dismissal; (2) plaintiffs had notified the Court of a Supreme Court case providing a new and more expansive interpretation of declaratory judgments; and (3) plaintiffs' proposed complaint narrowed the scope of the injunctive relief it had initially requested. *See Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023).

II. Plaintiffs File a Second Amended Complaint

In plaintiffs' second amended complaint, they maintain earlier factual allegations, contending that defendants implemented no recommendation provided to them via scientific reports warning of catastrophic climate change. Second Am. Compl. ("SAC") ¶ 153. Plaintiffs contend that, if defendants had not disregarded the evidence, "CO_2 emissions today would be reduced by 35% from 1987 levels." *Id.* Instead, since 1991, plaintiffs state that defendants have allowed CO_2 emissions from fossil fuel combustion to increase. *Id.* Plaintiffs provide tables setting forth data from government sources showing that fossil fuel production, fossil fuel energy consumption, and fossil fuel emissions have climbed substantially since 1965, and that by 2011, fossil fuel combustion in the U.S. accounted for 94% of CO_2 emissions. *Id.* ¶¶ 155-58. By 2012, data plaintiffs provide shows that the U.S. was the largest producer of natural gas, and the second largest producer of coal and energy production. *Id.* ¶ 160. By 2014, according to the United States Energy Information

Administration, the U.S. had become the largest producer of total petroleum in the world. *Id.* ¶ 161.

Plaintiffs assert that defendants knew the harmful effect of their actions would significantly endanger many, like plaintiffs, with damage persisting for millennia. *Id.* ¶¶ 1, 161. Despite that knowledge, plaintiffs allege defendants continued their policies and practices of promoting the exploitation of fossil fuels and that defendants acted with deliberate indifference to the peril they knowingly created. *Id.*

Plaintiffs' inventory cataloguing the regulatory permits, export permits, and approvals for leasing, drilling, and mining on public lands is substantial. The accounting of exploitation for fossil fuel extraction, coal tracts, and oil and gas leases is staggering. *Id.* ¶¶ 164-70. Plaintiffs comprehensively inventory the affirmative governmental promotion of fossil fuel combustion over decades. *Id.* ¶¶ 171-78.

Plaintiffs also include allegations drawing from scientific evidence documenting the tangible impacts of climate change. Evidence describes rising sea levels, severe droughts, hurricanes, wildfires, extreme heat, flash flooding, unprecedented ocean acidification, and rapid depletion of sea ice. *Id.* ¶¶ 213-41. Such events alter our air quality, water availability, water quality, crop yields, animal agriculture, and housing security. *Id.* Plaintiffs' allegations about what the future holds if climate change is unabated are harrowing. *Id.* ¶¶ 242-55.

As the legal basis for their claims, plaintiffs maintain that defendants have violated the Due Process Clause and Equal Protection Clause of the Fifth Amendment; the "unenumerated rights preserved for the people by the Ninth Amendment"; and the public trust doctrine. FAC at 84, 88, 91, 92; SAC at 133, 137, 140, 141 (bringing same claims for relief).

Plaintiffs seek declaratory relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. SAC ¶ 14. Requested relief includes a declaration that the United States national energy system that creates the harmful conditions described above has violated and continues to violate the Fifth Amendment of the U.S. Constitution and plaintiffs' constitutional rights to substantive due process and equal protection of the law. *Id.* at 143 ¶ 1. Further, plaintiffs seek a declaration that defendants violated public trust rights and a declaration that the Energy Policy Act, Section 201 is unconstitutional. *Id.* at 143 ¶¶ 2-3.[16] Plaintiffs request injunctive relief only if necessary and "as appropriate." *Id.* at 143 ¶ 4.

III. The Government Files a Motion to Dismiss

Defendants move to dismiss under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), asserting that plaintiffs lack standing; that plaintiffs cannot bring claims

16. As noted earlier, plaintiffs had initially sought injunctive relief, including an order directing defendants to "prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO_2 to stabilize the climate system." FAC at 94 ¶¶ 2, 6, 7.

in the absence of a statutory right of action; that plaintiffs ask the Court to exercise authority that exceeds the scope of its power under Article III of the Constitution; and that all of plaintiffs' claims fail on the merits. Defendants also assert that, if the Court denies their motion, it should again certify its decision for interlocutory appeal.

LEGAL STANDARDS

I. Motion to Dismiss – Federal Rule of Civil Procedure 12(b)(1)

A court reviews a motion to dismiss a complaint for lack of Article III standing under Rule 12(b)(1). *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018) (quoting *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011)). If the jurisdictional attack is facial, courts determine whether the allegations contained in the complaint are sufficient on their face to invoke federal jurisdiction, accepting all material allegations in the complaint as true and construing them in favor of the party asserting jurisdiction. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Once a party has moved to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the party invoking federal jurisdiction bears the burden of establishing the elements of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "[A] party must establish an Article III case or controversy before [a court can] exert subject matter jurisdiction." *Matter of E. Coast Foods, Inc.*, 66 F.4th 1214, 1218 (9th Cir. 2023). To satisfy the "irreducible constitutional minimum" of Article III standing, a plaintiff must establish (1) an injury in fact (2) that is fairly

traceable to the challenged conduct and show that a court can provide (3) a remedy likely to redress that injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

II. Motion to Dismiss – Federal Rule of Civil Procedure 12(b)(6)

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a "claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Id.* The tenet that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* (citing *Twombly*, 550 U.S. at 555). "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

DISCUSSION

Over the eight years litigating this case, plaintiffs have presented evidence spanning over 50 years describing

defendants' contribution to climate change through both inaction and affirmative promotion of fossil fuel use. The Court recalls plaintiffs' evidence included a letter by a top aide to President Nixon's domestic policy adviser emphasizing the effect of rising sea levels in 1969: "Goodbye New York. Goodbye Washington, for that matter."[17] In 1986, a Senate subcommittee observed that "there is a very real possibility that man—through ignorance or indifference, or both—is irreversibly altering the ability of our atmosphere to perform basic life support functions for the planet."[18] Those are but two documents out of hundreds highlighting the lengthy nature of government knowledge of the dangers of fossil fuel combustion. By and large, defendants have not disputed the factual premises of plaintiffs' claims. *Juliana,* 947 F.3d at 1167 (so stating). However, plaintiffs have not legally established that evidence. In reviewing defendants' motion to dismiss, the Court notes that, though it has held evidentiary hearings and painstakingly reviewed thousands of pages of declarations and exhibits, today, its task is solely to decide whether plaintiffs have standing to bring suit and state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(1), (6).

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17. Memorandum from Daniel P. Moynihan, Assistant to the President for Domestic Pol'y, to John Ehrlichman, Assistant to the President for Domestic Affs. (Sept. 17, 1969), [https://perma.cc/G92P-AKLJ].

18. *Ozone Depletion, the Greenhouse Effect, and Climate Change: Hearing Before the Subcomm. on Env't Pollution of the Comm. on Env't & Pub. Works*, 99th Cong. 2 (1986) (opening statement of Sen. John H. Chafee, Chairman, Subcomm. on Env't Pollution).

As an initial matter, defendants assert that the Court must consider whether the rule of mandate, as a jurisdictional rule, requires the Court to dismiss the second amended complaint. Mot. at 10. Next, defendants maintain that plaintiffs have failed to bring a justiciable case and that the Court must dismiss plaintiffs' claims under Rule 12(b)(1) for lack of subject matter jurisdiction. *Id.* at 10-16. Finally, defendants urge the Court to find that plaintiffs' claims fail on the merits and that plaintiffs should have brought this action under the Administrative Procedure Act ("APA") but failed to do so. *Id.* at 32.

I. Mandate of the Court of Appeals for the Ninth Circuit

Defendants state that the Ninth Circuit was clear when it remanded the case to the Court with instructions to dismiss. *Id.* at 11. Defendants argue that, when the scope of the remand is clear, a district court cannot vary or examine the mandate of an appellate court "for any other purpose than execution." *Id.* at 10 (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895)). Defendants contend that, rather than examine whether plaintiffs' amended pleadings establish redressability to satisfy the requirement of standing, the Court should reconsider the Ninth Circuit's mandate and dismiss the second amended complaint. *Id.* at 11. Because it is jurisdictional error to contravene a rule of mandate, the Court duly reconsiders the mandate of the Ninth Circuit and does not take the matter lightly.

"A district court that has received the mandate of an appellate court cannot vary or examine that mandate for

any purpose other than executing it." *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012). "Violation of the rule of mandate is a jurisdictional error." *Id.* at 1067. "But while the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it leaves to the district court any issue not expressly or impliedly disposed of on appeal." *S.F. Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986)). In determining which matters fall within the compass of a mandate, "[d]istrict courts must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Vizcaino v. U.S. Dist. Ct. for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999) (as amended) (quoting *Delgrosso v. Spang & Co.*, 903 F.2d 234, 240 (3d Cir. 1990)).

"Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings ..." *S.F. Herring*, 946 F.3d at 574 (quoting *Nguyen*, 792 F.2d at 1502); *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988). When the mandate in the prior appeal does not expressly address the possibility of amendment and does not indicate a clear intent to deny amendment seeking to raise new issues not decided, that mandate does not purport "to shut the courthouse doors." *S.F. Herring,* 946 F.3d at 574.

In *S.F. Herring,* the Ninth Circuit discussed its mandate in a prior appeal, which vacated the district court's order entering summary judgment in the defendants' favor

and directed the district court to dismiss the complaint. *See S.F. Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (vacating judgment and remanding case with instructions to dismiss for lack of subject matter jurisdiction). On remand, the district court allowed the plaintiff to file a second amended complaint. In the later appeal, the Ninth Circuit determined that the district court correctly found that the earlier mandate to dismiss did not prevent the plaintiff from seeking leave to re-plead. *S.F. Herring*, 946 F.3d at 574. The appellate court reasoned that in instructing the district court to dismiss, the mandate was silent on whether dismissal should be with or without leave to amend, and the mandate therefore did not preclude the district court from allowing plaintiff to file amended pleadings. *Id.* at 572-574.

When this Court granted plaintiffs' motion for leave to amend, it "consider[ed] plaintiffs' new factual allegations under the Declaratory Judgment Act and plaintiffs' amended request for relief, in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2023 WL 3750334, at *5 (D. Or. June 1, 2023). The Court once again finds that the Ninth Circuit's mandate did not address whether amendment, if permitted, would cure the deficiency it identified in plaintiffs' complaint.

The Ninth Circuit also did not instruct the Court to dismiss without leave to amend. Accordingly, its mandate to dismiss did not foreclose that opportunity, and the Court, on reconsideration, finds that in permitting

plaintiffs to proceed with their second amended complaint, the rule of mandate is not contravened. *S.F. Herring*, 946 F.3d at 574; *see also Creech v. Tewalt*, 84 F.4th 777, 783 (9th Cir. 2023) (where appellate court remanded and stated that plaintiff should have leave to amend, district court did not violate rule of mandate by dismissing *without* leave to amend, because appellate court did not expressly foreclose that option).

II. Standing

The Ninth Circuit determined that plaintiffs had established an injury in fact, traceable to defendants—the first two elements of constitutional standing. *Juliana* 947 F.3d at 1168-70. For completeness in its standing analysis, this Court adopts the Ninth Circuit's determination. Defendants reserve the right to "oppose" the Ninth Circuit's ruling. Mot. at 12.

Defendants contend that plaintiffs have not satisfied the third element of standing, because they failed to demonstrate that their injuries are "redressable" and that they are entitled to injunctive or declaratory relief. Defendants maintain that plaintiffs' requested relief fails, because plaintiffs cannot show that the relief they seek is (1) substantially likely to redress their injuries or (2) within the Court's power to award. *Id.* at 4-5, 12; *see also Spokeo,* 578 U.S. at 338.

A plaintiff must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at

561 (1992). Accordingly, at the motion-to-dismiss stage, "general allegations" suffice to establish standing because those allegations are presumed to "embrace those specific facts that are necessary to support the claim." *Id.* A plaintiff need not show a favorable decision is "certain" to redress his injury but must show a substantial likelihood it will do so. *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013). The injury need not be completely redressable; it is sufficient that the injury be partially redressed. *Meese v. Keene*, 481 U.S. 465, 476 (1987) ("enjoining the application of the words political propaganda to the films would at least partially redress the reputational injury of which appellee complains.").

As for plaintiffs' request for declaratory relief, the Ninth Circuit determined that a declaration would be "unlikely by itself to remediate [plaintiffs'] alleged injuries." *Juliana* 947 F.3d at 1170. For injunctive relief, the Ninth Circuit was "skeptical," but assumed without deciding that plaintiffs might be able to show that their injuries could be redressed by an order in their favor. *Id.* at 1171. That said, the appellate court based its ruling on the second redressability prong, stating that an injunction was "beyond the power of an Article III court to order, design, supervise, or implement." *Id.* Plaintiffs' second amended complaint scales down the requested injunctive relief, seeking "an injunction restraining [d]efendants from carrying out policies, practices, and affirmative actions that render the national energy system unconstitutional in a manner that harms [p]laintiffs," and only "if deemed necessary, just and proper." SAC at 143 ¶ 4.

Accordingly, for plaintiffs' claim for both injunctive relief and declaratory relief, the Court will evaluate whether each form of relief is (1) substantially likely to redress their injuries and (2) within the Court's power to award. *Spokeo,* 578 U.S. at 338.

A. Injunctive Relief

1. Substantial Likelihood of Redress

Defendants assert that an order enjoining defendants' fossil fuel activities will not stop catastrophic climate change or even partially ameliorate plaintiffs' injuries, and therefore, any such injunction is not substantially likely to redress plaintiffs' injuries and satisfy standing. Mot. at 12.

Whether a court order will halt *all* climate change by restraining defendants from carrying out fossil fuel activities is the wrong inquiry for at least two reasons. First, redressability does not require certainty, it requires only a substantial likelihood that the Court could provide meaningful relief. *Spokeo,* 578 U.S. at 338. Second, the possibility that some other individual or entity might cause the same injury does not defeat standing—the question is whether the injury *caused by the defendant* can be redressed.

Defendants have not disputed plaintiffs' factual allegations that they produce a quarter of all emissions on Earth. *Juliana*, 947 F.3d at 169. Based on plaintiffs' alleged facts, an order to defendants to refrain from

certain fossil fuel activities which are causing plaintiffs' injuries would redress those injuries. On the spectrum of likely to unlikely, a favorable court order is much closer to likely, *i.e.,* substantially likely, to redress plaintiffs' harm.

"Substantially likely" is a *legal* characterization, not an evidence based, scientific number. Quantifying a threshold datapoint at which plaintiffs' harm would be remedied would involve rigorous, disciplined fact-finding, and inevitably would raise a host of questions: What part of plaintiffs' injuries stem from causes beyond defendants' control? Even if emissions increase elsewhere, will the extent of plaintiffs' injuries be less if they obtain the relief they seek in this lawsuit? When would we reach this "point of no return" that plaintiffs' evidence describes, and do defendants have it within their power to avert reaching it, even without cooperation from third parties? All these questions are inextricably bound up in an evidentiary inquiry, and none of them can be answered at the motion-to-dismiss stage. At this junction, the Court finds that plaintiffs have shown that a favorable decision from this Court would be substantially likely to redress plaintiffs' injuries. Defendants' motion to dismiss is denied as to this issue.

2. The Court's Power to Provide Redress

Defendants assert that the Ninth Circuit determined that the injunction plaintiffs sought in their first amended complaint would "necessarily require a host of complex policy decisions entrusted ... to the wisdom and discretion of the executive and legislative branches," *Juliana*, 947

F.3d at 1171, decisions "which must be made by the People's elected representatives." *Id.* at 1172. Defendants maintain that, even with amendment, plaintiffs' requested injunctive relief is unavailable, because it would "enjoin the executive branch from exercising discretionary authority" granted to it by statute, and would enjoin Congress from exercising power expressly granted to it by the Constitution. Mot. at 13 (citing the Property Clause, U.S. Const. art. IV, § 3, cl. 2). In defendants' view, the requested injunction remains beyond a district court's power to award. *Id.*

While crafting and implementing injunctions in cases involving longstanding agency shortcomings may require rigorous, adversarial fact-finding to penetrate questions of science, there is nothing exceptional about a federal court issuing injunctions against federal agencies. *See e.g.*, *Nw. Env't Def. Ctr. v. United States Army Corps of Engineers*, No. 3:18-CV-00437-HZ, 2021 WL 3924046 (D. Or. Sept. 1, 2021) (injunction requiring U.S. Army Corps of Engineers to implement drawdown, spill, and specific fish management actions at its facilities; establishing an expert panel to craft implementation plans; and requiring status reports from agency).

Other federal district courts have similarly ordered agency action, and appellate courts have affirmed that granting this type of injunctive relief falls within the "broad equitable powers" of district courts. *Cobell VI*, 240 F.3d 1081, 1108 (D.C. Cir. 2001); *Gautreaux v. Romney*, 457 F.2d 124, 132 (7th Cir. 1972). Courts may also issue injunctions even when "ordering what is in effect

nationwide relief." *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987).

Without any explicit statutory command to the contrary, no court has held that these powers *categorically* fail on separation-of-powers grounds. *See* Samuel Buckberry Joyce, *Climate Injunctions: The Power of Courts to Award Structural Relief Against Federal Agencies*, 42 Stan. Env'tl. L.J. 241, 268-281, May 2023 (compiling cases featuring structural injunctions against the federal government).

Familiar instances of large-scale institutional litigation in modern American history include cases that ordered busing to desegregate schools;[19] the treaty rights cases that assured a fair share of fish for American Indian treaty fishers;[20] cases instituting prison condition reform;[21] and cases relating to land use and low-income housing.[22] Legal scholars have cited those cases and explained that injunctions in those cases "aimed to break down, scrutinize, and reform institutional dynamics and

19. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430 (1968).

20. *See, e.g.*, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975); *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

21. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Hutto v. Finney*, 437 U.S. 678 (1978).

22. *See Hills v. Gautreaux*, 425 U.S. 284, 298 (1976).

practices that caused the government to repeatedly violate fundamental rights of citizens to bring about enduring constitutional and civil rights compliance."[23]

In their first amended complaint, plaintiffs' requested remedy was an injunction requiring the government not only to "cease permitting, authorizing, and subsidizing" fossil fuel use, but also to "prepare a remedial plan subject to judicial approval to draw down harmful emissions." *Juliana*, 947 F.3d at 1170.

When it determined that plaintiffs' requested relief was beyond the power of an Article III court to order, the Ninth Circuit did not offer any explicit guidance on how to distinguish other structural injunction cases, where the district court has power to order specific, injunctive relief, from this case, where the relief necessary to redress plaintiffs' injuries is held to be too broad.

Plaintiffs have scaled back the specific directives they at first sought in the injunction in their first amended complaint. At this point in the litigation, where the facts alleged are accepted as true, the Court can only identify one distinction between the injunction plaintiffs' request and the injunctions issued in the structural reform cases described above. In other reform cases, those plaintiffs' obtained injunctions against a single agency for a discreet violation of law. In this case, plaintiffs seek relief on constitutional grounds and historical trust principles against a host of governmental defendants.

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23. Wood, *Eve of Destruction*, at 262.

The Court appreciates that, under existing precedent, an injunction of the scope plaintiffs first requested, and the "scaled down" request plaintiffs make now, against every named defendant in this suit, would be more expansive than any case of which the Court is aware.

On the other hand, requiring plaintiffs to bring piecemeal statutory actions against individual agencies perpetuates a status quo unlikely to bring about the all-out course correction necessary to avoid the impending crisis. Requiring plaintiffs to file individual suits premised on discreet agency shortcomings may be a viable path to achieving protections for the environment. However, a court order directing the agencies to work together, outside their silos to oversee resolution of a complex, multiagency problem may prove especially constructive where a practical solution has eluded the entire government for decades.

Such an order has not proven to be necessary—and is perhaps premature—at this point in the case. Plaintiffs' amended request for injunction, though narrower, still treads on ground over which Ninth Circuit cautioned the Court not to step. If the reform plaintiffs seek is to prod a negotiated change of behavior, it is unnecessary to seek injunctive relief at this point to do so. Defendants' motion to dismiss plaintiffs' claim for injunctive relief is granted.

B. Declaratory Relief

Plaintiffs' second amended complaint seeks a declaration that "the national energy system" violates

the Constitution and the public trust doctrine. SAC at 143, ¶¶ 1-3. Defendants contend that plaintiffs' claim for declaratory relief must be dismissed, asserting that the declaration is not materially distinct from the declaration plaintiffs sought in their first amended complaint. And defendants argue that plaintiffs cannot satisfy the two prongs for redressability, because an "unbounded declaration" alone will not redress plaintiffs' injuries, and declaring an "energy system" unconstitutional would "functionally declare unconstitutional unspecified laws, regulations, and policies," and such a declaration is therefore not within the power of a federal court. Mot. at 14.

1. Substantial Likelihood of Redress

Under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.*, courts can grant declaratory relief in the first instance and later consider if further relief is warranted. "In a case of actual controversy within its jurisdiction, [ ] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

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The Supreme Court has long recognized that declaratory judgment actions can provide redressability, even where relief obtained is a declaratory judgment alone. *See generally Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) *and Utah v. Evans*, 536 U.S. 452 (2002). In *Franklin* and *Evans*, states objected to the technique used by the Census Bureau to count people and those states sued government officials.

In *Franklin v. Massachusetts*, the Supreme Court stated that "[f]or purposes of establishing standing," it did not need to decide whether injunctive relief was appropriate where "the injury alleged is likely to be redressed by declaratory relief," and the court could "assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court." 505 U.S. at 803. In *Utah v. Evans*, the Supreme Court referenced *Franklin*, explaining that, in terms of its "standing" precedent, declaratory relief affects a change in legal status, and the practical consequence of that change would "amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 536 U.S. 452 (2002).

Other cases recognize the role of declaratory relief in resolving Constitutional cases. *See, e.g.*, *Evers v. Dwyer*, 358 U.S. 202, 202-04 (1958) (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A court may grant

declaratory relief even though it chooses not to issue an injunction or mandamus.").

Finally, the Supreme Court held that, for the purpose of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right, even where the underlying unlawful conduct had ceased. *Uzuegbunam*, 592 U.S. 279, ––––, 141 S. Ct. 792, 802. *Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal, trivial, or partial. As Justice Thomas stated, in the context of nominal damages, "True, a single dollar often cannot provide full redress, but the ability to effectuate a partial remedy satisfies the redressability requirement. 592 U.S. at ––––, 141 S. Ct. at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)).

To satisfy redressability under Article III, plaintiffs need not allege that a declaration alone would solve their every ill. To plead a justiciable case, a court need only evaluate "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

There is nothing in § 2201 preventing a court from granting declaratory relief even if it is the only relief

awarded. Section 2201 provides that declaratory relief may be granted "whether or not further relief is or could be sought." *Id.* Under the statute, the relief plaintiffs seek fits like a glove where plaintiffs' request declaratory relief independently of other forms of relief, such as an injunction. *See Steffel v. Thompson*, 415 U.S. 452, 475, (1974) (stating in a different context that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded."). A declaration that defendants are violating plaintiffs' constitutional rights may be enough to bring about relief by changed conduct.

2. The Court's Power to Provide Redress

As expressed in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. at 177. Over the course of American history, courts have corrected longstanding, systemic wrongs of political branches that encroach on the fundamental rights of citizens.

The judiciary has the unique and singular duty to both declare constitutional rights and prevent political acts that would curb or violate those rights. *Id.* at 167. It is a foundational doctrine that when government conduct harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Id.* at 176-78.

The Act gives "federal courts competence to make a declaration of rights." *Pub. Affairs Associates v. Rickover*,

369 U.S. 111, 112 (1962). The Supreme Court has found it "consistent with the statute ... to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune,* 549 U.S. at 136.

A declaratory judgment need not be "unbound" as defendants assert but may precisely describe and quantify the government's obligations. For example, in the landmark treaty fishing cases, courts declared the tribes right to take up to 50 percent of the harvestable quantities of fish. *United States v. Washington*, 520 F.2d 676, 687 (9th Cir. 1975).

Declaratory judgments are thus firmly sited within the core competences of the courts in a way that structural injunctions are not. Declaratory judgments ask courts to declare actions lawful or unlawful, applying legal standards to a set of facts. Unlike structural injunctions, which envision an on-going dialogue between the court and the parties, the declaratory relief model facilitates a dialogue between the parties. Following a court's declaration of rights, which serves as the baseline below which a defendant may not fall, the various stakeholders are left to handle the details.[24]

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24. *See generally* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 Buff. L. Rev. 549 (May 2015) (discussing models of structural reform and encouraging public interest lawyers to consider declaratory relief as an effective and uniquely suited tool for structural reform in the modern age).

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From the beginning, the Court has envisioned that the government defendants would be interested in collectively developing a remedial plan of their own making—not of the Court's making—containing measures that they decide are appropriate to bring the agencies into constitutional compliance.

Following a declaratory judgment outlining the constitutional benchmark, a fact-finding stage often requires scientific analysis (a proficiency in which defendants are well-equipped) along with production of data defendants most likely already possess. To avoid complex remedial issues from clouding the foundational task of defining plaintiffs' basic rights and defendants' consequent obligations, the Court would bifurcate the case into a "liability" stage and a "remedy" stage.

The liability stage may allow the Court to specify legal obligations in a declaratory judgment, while the remedy stage demands a more innovative judicial role to supervise the parties in crafting a plan. During the remedy stage, the Court could invoke the usual standards of deference to the agency, while the case remains open under its ongoing jurisdiction so that parties can challenge aspects of the remedy implementation without bringing a new lawsuit.

One model of supervision involves the appointment of a special master to handle complex factual issues, make determinations on recurring issues, and make recommendations to the court. Consent decrees are used in many contexts of long-lasting government violations. Professor Wood points out one notable example in the

environmental context that arose from a treaty fishing case, *United States v. Oregon*, handled by Judge Belloni, U.S. District Court of Oregon.[25] The litigation "culminated in a consent decree" and the Columbia River Fish Management Plan ("CRFMP") became "a model of judicial administration that gained nationwide acclaim."[26]

The CRFMP established a system of co-management between nine sovereigns (states, tribes, and the federal government) managing treaty fisheries in the Columbia River Basin. *See United States v. Oregon*, 699 F. Supp. at 1469 (describing and approving Columbia River Fish Management Plan). The CRFMP set forth detailed management criteria for each fishery, established technical and policy committees, and created a dispute resolution process that involved the court only as a last resort. Professor Wood argues that by "allowing the sovereign parties to identify points of agreement and work out the details of a remedy using their own administrative and scientific expertise, the consent decree process can create an enduring remedy structure to fit complex institutional and biological circumstances."[27]

Defendants have not shown that plaintiffs' claim for declaratory relief falls outside the scope of the Court's authority, where "facts bearing on the usefulness of

25. Wood, *Eve of Destruction*, at 264 (citing *United States v. Oregon*, 699 F. Supp. 1456, 1469 (D. Or. 1988) (describing and approving the CRFMP)).

26. *Id.*

27. *Id.*

the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within [its] grasp." *MedImmune,* 549 U.S. at 136. Accordingly, defendants' motion to dismiss is denied as to this issue.

III. Political Question Doctrine

Defendants maintain that plaintiffs' claims present political questions over which the Court lacks jurisdiction. Mot. at 12-19. In defendants' view, plaintiffs ask the Court to "review and assess the entirety of Congress's and the Executive Branch's programs and regulatory decisions relating to climate change and then to pass on the comprehensive constitutionality of all of those policies, programs, and inaction in the aggregate." *Id.* at 17. Defendants assert that no federal court "has ever purported to use the judicial [p]ower to perform such a sweeping policy review." *Id.*

Defendants appear to misunderstand the function of the Court acting within its prescribed authority to declare what the law is—it is not the Court which will perform "a sweeping policy review," it is *defendants.*

There is no need for the Court to step outside its prescribed role to decide this case. At its heart, this lawsuit asks the Court to determine whether defendants have violated plaintiffs' constitutional rights. That question is squarely within the purview of the judiciary. *See INS v. Chadha*, 462 U.S. 919, 941 (1983) (the judiciary is bound to determine whether the political branches have "chosen a constitutionally permissible means of implementing

[their] power"); *Jewel v. Nat'l Sec. Agency,* 673 F.3d 902, 912 (9th Cir. 2011) (although lawsuit challenging federal agencies' surveillance practices "strikes at the heart of a major public policy controversy," claims were justiciable because they were "straightforward claims of statutory and constitutional rights, not political questions.").

The Court previously analyzed whether plaintiffs' claims presented a political question under *Baker v. Carr*, 369 U.S. 186 (1962) and adopts that analysis here. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1235-42 (D. Or. 2016) *rev'd and remanded on other grounds*, 947 F.3d 1159 (9th Cir. 2020). The Ninth Circuit explicitly stated that it did not find that plaintiffs had presented a political question. *Juliana*, 947 F.3d at 1174 n.9 ("Contrary to the dissent, we do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns").

Here the Constitution entrusts defendants with the power to oversee departments and agencies in the executive branch in their administration of the broad range of laws committed to their implementation. Mot. at 18. Speculation about the remedial stage does not support dismissal. *Baker*, 369 U.S. at 198 ("Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at trial."). Because the Court finds that under *Baker*, the political question doctrine does not impede plaintiffs' claims, defendants' motion to dismiss is denied on this issue.

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IV. First Claim for Relief – Due Process Clause of the Fifth Amendment

Plaintiffs allege that the Due Process Clause of the Fifth Amendment recognizes and preserves the fundamental right of citizens to be free from government actions that harm "life, liberty, and property." SAC ¶ 278. Plaintiffs maintain that these "inherent and inalienable rights" reflect the basic societal contract of the Constitution to protect citizens and "posterity"—future generations—from government infringement upon basic freedoms and basic rights. *Id.* Plaintiffs state that defendants' affirmative aggregate acts have been and are infringing on plaintiffs' liberties, by knowingly creating a destabilized climate system that is causing irreversible harm.

Defendants challenge plaintiffs' due process claims on two grounds. First, they assert any challenge to defendants' affirmative actions (*i.e.*, leasing land, issuing permits) cannot proceed because plaintiffs have failed to identify infringement of a fundamental right or discrimination against a suspect class of persons.

Second, they argue plaintiffs cannot challenge defendants' inaction (*i.e.*, failure to prevent third parties from emitting CO_2 at dangerous levels). Defendants maintain that the Constitution "does not impose an affirmative duty to protect individuals, and plaintiffs have failed to allege a cognizable claim under the "state-created danger" exception to that rule. Mot. at 21.

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Defendants state that the Supreme Court has repeatedly instructed courts considering novel due process claims to "exercise the utmost care whenever ... asked to break new ground in this field, ... lest the liberty protected by the Due Process Clause be subtly transformed" into judicial policy preferences. *Id.* at 19-20 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). Defendants maintain that plaintiffs' request to recognize an implied fundamental right to a stable climate system, SAC ¶ 304, "contradicts that directive, because such a purported right is without basis in the Nation's history or tradition." Mot. at 20.

A. Affirmative Government Action and Due Process

The Due Process Clause of the Fifth Amendment to the United States Constitution bars the federal government from depriving a person of "life, liberty, or property" without due process of law. U.S. Const. amend. V.

When a plaintiff challenges affirmative government action under the Due Process Clause, the threshold inquiry is the applicable level of judicial scrutiny. *Witt v. Dep't of the Air Force*, 527 F.3d 806, 813 (9th Cir. 2008). The default level of scrutiny is rational basis, which requires a reviewing court to uphold the challenged governmental action so long as it "implements a rational means of achieving a legitimate governmental end[.]" *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) (quotation marks omitted). When the government

infringes on a "fundamental right," however, a reviewing court applies strict scrutiny. *Witt*, 527 F.3d at 817. Substantive due process "forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, (1993).

It appears undisputed by plaintiffs, and in any event is clear to this Court, that defendants' affirmative actions would survive rational basis review. Resolution of this part of the motion to dismiss therefore hinges on whether plaintiffs have alleged infringement of a fundamental right.

Fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) "deeply rooted in this Nation's history and tradition" or (2) "fundamental to our scheme of ordered liberty[.]" *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (internal citations, quotations, and emphasis omitted). Seemingly "new" fundamental rights are not out of bounds. When the Supreme Court broke new legal ground by recognizing a constitutional right to same-sex marriage, Justice Kennedy wrote that

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights ... did not presume to know the extent of freedom in all its dimensions, and so they entrusted to future generations a charter protecting the

> right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitutions central protections and a received legal stricture, a claim to liberty must be addressed.

Obergefell v. Hodges, 576 U.S. 644, 664 (2015). Thus, "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution ... [that] has not been reduced to any formula." *Id.* at 663-64 (citation and quotation marks omitted). In determining whether a right is fundamental, courts must exercise "reasoned judgment," keeping in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries." *Id.* at 664. The genius of the Constitution is that its text allows "future generations [to] protect ... the right of all persons to enjoy liberty as we learn its meaning." *Id.*

Exercising "reasoned judgment," *id.*, the Court finds that the right to a climate system that can sustain human life is fundamental to a free and ordered society.

Defendants contend plaintiffs are asserting a right to be free from pollution or climate change, and that courts have consistently rejected attempts to define such rights as fundamental. Mot. at 20. Defendants mischaracterize the right plaintiffs assert. Plaintiffs do not object to the government's role in producing any pollution or in causing any climate change; they assert the government has caused pollution and climate change on a catastrophic level, and that if the government's actions continue unchecked, they

will permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live.

In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, damage property, threaten human food sources, and dramatically alter the planets ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

How can the judiciary uphold the Constitution's guarantee that the government shall not deprive its citizens of life without due process, while also upholding government "actions that could leave [future generations] a world with an environment on the brink of ruin and no mechanism to assert their rights." *Aji P. v. State*, 198 Wash. 2d 1025, 497 P.3d 350, 351 (2021) (Gonzalez, C.J.) (dissenting). We cannot vow to uphold the Constitution's protection of a God-given right to life, and at the same time, exercise "judicial restraint" by telling plaintiffs that "life" cannot possibly include the right to be free from knowing government destruction of their ability to breathe, to drink, or to live. "It cannot be presumed that any clause in the [C]onstitution is intended to be without effect." *Marbury*, 5 U.S. at 174. Plaintiffs have adequately alleged infringement of a fundamental right and defendants' motion to dismiss is denied on this issue.

B. Government Inaction Under the Due Process Clause

Plaintiffs allege that "[a]cting with full appreciation of the consequences of their acts, defendants knowingly caused, and continue to cause, dangerous interference with our atmosphere and climate system." SAC ¶ 280. They allege this danger stems, "in substantial part, [from] [d]efendants' historic and continuing permitting, authorizing, and subsidizing of fossil fuel extraction, production, transportation, and utilization." *Id.* ¶ 279. Plaintiffs allege defendants acted "with full appreciation" of the consequences of their acts. *Id.* ¶¶ 278–79. Plaintiffs challenge defendants' failure to limit third-party CO_2 emissions under the danger creation exception stated in *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

The Due Process Clause imposes no duty on the government to protect persons from harm inflicted by third parties that would violate due process if inflicted by the government. *Id.* at 196; *accord Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011). As a general matter:

> [The Due Process Clause] is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

DeShaney, 489 U.S. at 194-95. The Ninth Circuit recognizes two narrow exceptions to the no-duty-to-protect rule from *DeShaney*: (1) the "special-relationship" exception, which applies to individuals involuntarily placed in state custody; and (2) the state-created danger exception. *Murguia v. Langdon*, 61 F.4th 1096, 1106 (9th Cir. 2023).

In the Ninth Circuit, a plaintiff challenging government inaction on a danger creation theory must first show the "state actor create[d] or expose[d] an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). The state action must place the plaintiff "in a worse position than that in which he would have been had the state not acted at all." *Pauluk v. Savage*, 836 F.3d 1117, 1125 (9th Cir. 2016) (quotation marks omitted and alterations normalized).

Second, the plaintiff must show the "state actor ... recognize[d]" the unreasonable risks to the plaintiff and "actually intend[ed] to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011) (brackets and quotation marks omitted). The defendant must have acted with "[d]eliberate indifference," which "requires a culpable mental state more than gross negligence." *Pauluk*, 836 F.3d at 1125 (quotation marks omitted).

Defendants assert that applying the *DeShaney* exception to the circumstances of this case would cause

the exception to swallow the rule, arguing that "[e]very instance" in which the Ninth Circuit has "permitted a state-created danger theory to proceed has [also] involved an act by a government official that created an obvious, immediate, and particularized danger to a specific person known to that official." Mot. at 22; *Pauluk*, 836 F.3d at 1129-30 (Murguia, J., concurring in part and dissenting in part) (internal quotation marks omitted). Defendants assert that plaintiffs fail to identify immediate harm to their personal security or bodily integrity and identify no government actions or actors that put them in danger—only general degradation of the climate, without the immediate, direct, physical, and personal harms at issue in the above referenced cases. Mot. at 20.

Plaintiffs' allegations include "[harm to] plaintiffs' dignity, including their capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, maintain their bodily integrity, and lead lives with access to clean air, water, shelter, and food." SAC ¶ 283. In the face of these risks, plaintiffs allege defendants "have had longstanding, actual knowledge of the serious risks of harm and have failed to take necessary steps to address and ameliorate the known, serious risk to which they have exposed [p]laintiffs." *Id.* ¶ 285.

Accepting the allegations of the complaint as true, plaintiffs have adequately alleged a danger creation claim. Defendants' arguments do not reflect that *DeShaney* imposes rigorous proof requirements. A plaintiff asserting a danger-creation due process claim must show (1) the government's acts created the danger to the plaintiff; (2)

the government knew its acts caused that danger; and (3) the government with deliberate indifference failed to act to prevent the alleged harm. These stringent standards are sufficient safeguards against the flood of litigation concerns raised by defendants.

At the motion-to-dismiss stage, the Court accepts the factual allegations in the complaint as true. Plaintiffs have alleged that defendants helped create the current climate crisis, that defendants acted with full knowledge of the consequences of their actions, and that defendants have failed to correct or mitigate the harms they helped create in deliberate indifference to the injuries caused by climate change. Plaintiffs may therefore proceed with their substantive due process challenge to defendants' failure to adequately regulate CO_2 emissions and defendants' motion to dismiss is denied as to this issue.

V. Second Claim for Relief: Equal Protection Under the Fifth Amendment

Plaintiffs allege that both unborn members of "future generations" and minor children who cannot vote are a suspect classification. SAC ¶¶ 290-301. Plaintiffs state that, for purposes of this action, they should be treated as protected classes because many harmful effects caused by the acts of defendants will occur again. *Id.* ¶ 297. Plaintiffs maintain that the Court should determine they must be treated as protected classes, and federal laws and actions that disproportionately discriminate against and endanger them must be invalidated. *Id.*

Appendix D

Defendants assert that "[n]one of the government actions that [p]laintiffs complain of classify or affect youth or posterity any differently than they affect other persons." Mot. at 29. While plaintiffs' allegations are to the contrary, asserting that future generations will be decidedly more effected by climate change, defendants assert that their actions furthering fossil fuel combustion survive rational basis review, because plaintiffs cannot allege that there is no conceivable set of facts that could provide a rational basis for defendants' actions. *Id.*

Both the Supreme Court and the Ninth Circuit have held that age is not a suspect class. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008). *Stanglin* and *Flores-Villar* both applied rational basis review to governmental action that discriminated against teenagers of a similar age to plaintiffs here. In both cases, that discrimination was found to be permissible if it had a rational basis.

Even if plaintiffs' suspect-class argument were not foreclosed by precedent, the Court would not be persuaded to break new ground in this area. *See Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) ("No cases have ever held, and we decline to hold, that children are a suspect class.").

Accordingly, defendants' motion to dismiss plaintiffs' equal protection claim based on plaintiffs' constituting a suspect class is granted.

VI. Third Claim for Relief: Unenumerated Rights Under the Ninth Amendment

Plaintiffs' third claim for relief, which is pleaded as a freestanding claim under the Ninth Amendment, alleges that the Nation's founders intended that the federal government would have both the authority and the responsibility to be a steward of our country's essential natural resources. SAC ¶ 303. This stewardship, plaintiffs assert, is clear from the delegation of powers to manage lands and the conveyed authority to address major challenges facing our nation. *Id.* Plaintiffs allege that among the "implicit liberties protected from government intrusion by the Ninth Amendment" is the right to be "sustained by our country's vital natural systems, including our climate system." *Id.*

Defendants assert that the Ninth Amendment has never been recognized as independently securing any constitutional right, and that this claim must be dismissed. Mot. at 21; *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986).

Defendants are correct. Plaintiffs' Ninth Amendment claim is not viable. *Id.* Defendants' motion to dismiss plaintiffs' third claim for relief is granted.

VII. Fourth Claim for Relief: Rights Under Public Trust Doctrine

Plaintiffs' public trust claim arises from the particular application of the public trust doctrine to essential natural

resources. The complaint alleges that the overarching public trust resource is our country's life-sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere. SAC ¶ 308. Plaintiffs assert that defendants must take affirmative steps to protect those trust resources. *Id.* As sovereign trustees, plaintiffs contend that defendants have a duty to refrain from "substantial impairment" of these essential natural resources. *Id.* ¶ 309. The affirmative aggregate acts of defendants, in plaintiffs' view, in fossil fuel production and consumption have "unconstitutionally caused, and continue to cause, substantial impairment to the essential public trust resources." *Id.*

Plaintiffs allege that defendants have failed in their duty of care to safeguard plaintiffs' interest as the present and future beneficiaries of the public trust, and that such an abdication of duty abrogates the ability of succeeding members of the Executive Branch and Congress to provide for the survival and welfare of our citizens and to promote the endurance of our nation. *Id.*

Defendants assert that plaintiffs' fourth claim for relief, asserting public trust claims, should be dismissed for two independent reasons. Mot. at 24. First, any public trust doctrine is a creature of state law that applies narrowly and exclusively to particular types of state-owned property not at issue here. *Id.*; U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."). Defendants contend there is no

basis for plaintiffs' public trust claim against the federal government under federal law. Second, the "climate system" or atmosphere is not within any conceivable federal public trust. *Id.*

The Court has expended innumerable hours in research and analysis of plaintiffs' public trust claim and, in prior orders, determined that plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1255 (D. Or. 2016), *rev'd and remanded on other grounds,* 947 F.3d 1159 (9th Cir. 2020). Because the Ninth Circuit did not reach the merits of plaintiffs' claims, the Court incorporates its analysis and legal conclusions, as stated in *Juliana*, 217 F. Supp at 1255-61 (finding that plaintiffs' alleged injuries relate to the effects of ocean acidification and rising ocean temperatures, thus pleadings adequately alleged harm to public trust assets; the public trust doctrine applies to the federal government; the federal government, like the states, holds public assets, including the territorial seas, in trust for the people; environmental statutes have not displaced the venerable public trust doctrine; and plaintiffs' claims rest "directly on the Due Process Clause of the Fifth Amendment and are enforceable against the federal government.").

Accordingly, the Court finds that plaintiffs have stated a claim under a purported public trust doctrine. Defendants' motion to dismiss plaintiffs' fourth claim for relief is denied.

Appendix D

VIII. Action Under Administrative Procedure Act

Defendants argue that plaintiffs needed to bring their claims under the Administrative Procedure Act ("APA") and failed to do so. Mot. at 32.

The Court finds that the APA does not govern plaintiffs' claims, and that, as a result, plaintiffs' failure to state a claim under the APA is not a ground for dismissing this action. The Ninth Circuit found that "[w]hatever the merits of the plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA." *Juliana*, 947 F.3d at 1167-68. Defendants' motion to dismiss is denied as to this issue. Defendants reserve their right to disagree with the Ninth Circuit's determination on this point but concede that the Ninth Circuit's decision governs, and respectfully preserve their arguments on the applicability of the APA for potential further review.

CONCLUSION

Other courts across the United States have noted that "[w]ith each year, the impacts of climate change amplify and the chances to mitigate dwindle." *Matter of Hawai'i Elec. Light Co., Inc.*, 152 Haw. 352, 359 (2023). The judicial branch of government can no longer "abdicat[e] responsibility to apply the rule of law." *Id.* at 365 (Wilson, J., concurring). For the reasons explained, Defendants' motion to dismiss the second amended complaint, ECF No. 547, is GRANTED in part and DENIED in part. The Court also DENIES defendants' request to certify for interlocutory review this opinion and order; DENIES

defendants' motion for an order certifying its prior order, ECF No. 540, for interlocutory appeal, ECF No. 551; and DENIES defendants' motion to stay litigation, ECF No. 552. The Court GRANTS plaintiffs' motion to set a pretrial conference, ECF No. 543, and ORDERS the parties to confer and contact the Court to schedule a telephonic status conference to discuss next steps in this case.

It is so ORDERED on this day, December 29, 2023.

APPENDIX E

2023 WL 3750334

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON, EUGENE DIVISION

Civ. No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Signed: June 1, 2023

OPINION AND ORDER

AIKEN, District Judge:

In this civil rights action, plaintiffs—a group of young people between the ages of eight and nineteen when this lawsuit was filed and "future generations" through their guardian Dr. James Hansen—allege injury from the devastation of climate change and contend that the Constitution guarantees the right to a stable climate system capable of sustaining human life. Plaintiffs

maintain that federal defendants have continued to permit, authorize, and subsidize fossil fuel extraction and consumption, despite knowledge that those actions cause catastrophic global warming. This case returns to this Court on remand from the Ninth Circuit Court of Appeals, where plaintiffs demonstrated their "injury in fact" was "fairly traceable" to federal defendants' actions—two of three requirements necessary to establish standing under Article III. However, the Ninth Circuit reversed with instructions to dismiss plaintiffs' case, holding that plaintiffs failed to demonstrate "redressability"—the third, final requirement to establish Article III standing. The Ninth Circuit determined that plaintiffs did not "surmount the remaining hurdle" to prove that the relief they seek is within the power of an Article III court to provide. *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020). After that court's decision, plaintiffs moved to amend, notifying this Court of an intervening change in controlling law, *Uzuegbunam v. Preczewski*, — U.S. —, 141 S. Ct. 792, 209 L.Ed.2d 94 (2021), asserting abrogation of the Ninth Circuit's ruling on redressability. Now, plaintiffs contend that permitting amendment will allow plaintiffs to clear the hurdle the Ninth Circuit identified, so that the case may proceed to a decision on the merits. For the reasons explained, this Court grants plaintiffs' motion for leave to file a second amended complaint. (Doc. 462).

BACKGROUND

In August 2015, plaintiffs brought this action asserting that the federal government has known for decades that

carbon dioxide pollution was causing catastrophic climate change and that large-scale emission reduction was necessary to protect plaintiffs' constitutional right to a climate system capable of sustaining human life. (Doc. 7 at 51). As the Ninth Circuit recognized, plaintiffs provided compelling evidence, largely undisputed by federal defendants, that "leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Juliana*, 947 F.3d at 1166. The substantial evidentiary record supports that since the dawn of the Industrial Age, atmospheric carbon dioxide has "skyrocketed to levels not seen for almost three million years," with an astonishingly rapid increase in the last forty years. *Id.* at 1166. The Ninth Circuit summarized what plaintiffs' expert evidence establishes: that this unprecedented rise stems from fossil fuel combustion and will "wreak havoc on the Earth's climate if unchecked." *Id.* The problem is approaching "the point of no return," the court stated, finding that the record conclusively demonstrated that the federal government has long understood the risks of fossil fuel use. *See id.* (cataloguing, as early as 1965, urgent warnings and reports from government officials imploring swift nationwide action to reduce carbon emissions before it was too late).

In their first amended complaint, filed in the District Court for the District of Oregon, plaintiffs alleged violations of their substantive rights under the Due Process Clause of the Fifth Amendment; the Fifth Amendment right to equal protection of the law; the Ninth Amendment; and the public trust doctrine. (Doc. 7). Plaintiffs also sought several forms of declaratory

relief and an injunction ordering federal defendants to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]." *Id.* at 94-95.

Federal defendants moved to dismiss for lack of standing, failure to state a cognizable constitutional claim, and failure to state a claim on a public trust theory. (Doc. 27). Adopting the findings and recommendation of Federal Magistrate Judge Thomas Coffin, this Court denied federal defendants' motion, concluding that plaintiffs had standing to sue, raised justiciable questions, and had stated a claim for infringement of a Fifth Amendment due process right:

> In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation[.] To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.

Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

At that stage of litigation, this Court also determined that plaintiffs had stated a viable due process claim arising from federal defendants' failure to regulate third-party emissions and had stated a public trust claim grounded in the Fifth and the Ninth Amendments. *Id.* at 1252, 1259.

Federal defendants moved to certify to the Ninth Circuit for interlocutory appeal[1] this Court's order denying federal defendants' motion to dismiss. Doc. 120. This Court denied the motion to certify. (Doc. 172). Federal defendants petitioned the Ninth Circuit for Writ of Mandamus, contending that this Court's opinion and order denying their motion to dismiss was based on clear error. (Doc. 177). The Ninth Circuit denied the petition, concluding mandamus relief was unwarranted at that stage of litigation, when plaintiffs' claims could be "narrowed" in further proceedings. *See In re United States*, 884 F.3d 830, 833 (9th Cir. 2018).

Federal defendants then filed several motions so aimed at narrowing plaintiffs' claims, including motions for judgment on the pleadings, doc. 195; a protective order barring discovery, doc. 196; and for summary judgment, doc. 207. This Court denied defendants' motion for a protective order. (Doc. 212). But this Court granted in

1. A request for permissive interlocutory appeal is governed by 28 U.S.C. § 1292(b), which permits a district court to certify an interlocutory order for immediate appeal if the court is of the opinion that such order: (1) involves a controlling question of law; (2) as to which there is substantial ground for difference of opinion; and (3) that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

part and denied in part federal defendants' motions for judgment on the pleadings and for summary judgment, dismissing plaintiffs' Ninth Amendment claim, dismissing the President as a defendant, and narrowing plaintiffs' equal protection claim to a fundamental rights theory. *Juliana v. United States*, 339 F. Supp. 3d 1062 1103 (D. Or. 2018), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

Federal defendants unsuccessfully petitioned for mandamus in the Ninth Circuit and twice sought, and were twice denied, a stay of proceedings by the United States Supreme Court. Ultimately, the Ninth Circuit, on November 8, 2018, issued an order inviting this Court to certify for interlocutory review its orders on federal defendants' dispositive motions. *United States v. U.S. Dist. Court for the Dist.* of Or., No. 18-73014. Shortly thereafter, the Ninth Circuit granted federal defendants' petition to appeal.

On interlocutory appeal of this Court's certified orders denying federal defendants' motions for dismissal, judgment on the pleadings, and summary judgment, the Ninth Circuit agreed with this Court's determination that plaintiffs had presented adequate evidence at the pre-trial stage to show particularized, concrete injuries to legally protected interests. That court recounted evidence that one plaintiff was "forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation[,]" and another "had to evacuate his coastal home multiple times because of flooding." *Id.* at 1168. The Ninth Circuit also determined that this Court correctly found plaintiffs had presented sufficient

evidence that their alleged injuries are fairly traceable to federal defendants' conduct, citing among its findings that plaintiffs' injuries "are caused by carbon emissions from fossil fuel production, extraction, and transportation" and that federal subsidies "have increased those emissions," with about 25% of fossil fuels extracted in the United States "coming from federal waters and lands," an activity requiring federal government authorization. *Id.* at 1169. The court held, however reluctantly, that plaintiffs failed to show their alleged injuries were substantially likely to be redressed by any order from an Article III court and that plaintiffs therefore lacked standing to bring suit. *Id.* at 1171.

In so holding, the court stated, "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular," however, such was "beyond the power of an Article III court to order, design, supervise, or implement." *Id.* at 1171. Ultimately, based on its redressability holding alone, the Ninth Circuit reversed the certified orders of this Court and remanded the case with instructions to dismiss for lack of Article III standing. *Id.* at 1175.

After the Ninth Circuit issued its interlocutory opinion, plaintiffs notified this Court of what they identified as an intervening case in the United States Supreme Court which held that the award of nominal damages was "a form of declaratory relief in a legal system with no general declaratory judgment act" and

that a "request for nominal damages alone satisfies the redressability element of standing where a plaintiff 's claim is based on a completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 798, 802. Writing for the majority, Justice Thomas explained that, even where a single dollar cannot provide full redress, the ability "to effectuate a *partial remedy*" satisfies the redressability requirement. *Id.* at 801 (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)) (emphasis added).

Plaintiffs contend that the Supreme Court's holding constitutes—as Chief Justice Roberts noted in his dissent—an "expansion of the judicial power" under Article III. *Uzuegbunam*, 141 S. Ct. at 806 (Roberts, C. J. dissenting). According to plaintiffs, the Ninth Circuit was skeptical, but did not decide whether declaratory relief alone would satisfy redressability, where such relief only partially redresses injury. Plaintiffs assert that they should be granted leave to amend to replead factual allegations demonstrating that relief under the under the Declaratory Judgment Act, 28 U.S.C. § 2201, is sufficient to allege redressability, even where a declaration effectuates a partial remedy, as stated in *Uzuegbunam*, which the Ninth Circuit did not have the chance to consider.

LEGAL STANDARD

Federal Rule of Civil Procedure Rule 15 allows a party to amend its pleading "with the opposing party's written consent or the court's leave." The rule instructs that "[t]he court should freely give leave when justice

so requires." Fed. R. Civ. P. 15(a)(2). Trial courts have discretion in deciding whether to grant leave to amend, but "[i]n exercising this discretion, a court must be guided by the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or technicalities." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). The judicial policy of Rule 15 favoring amendments should be applied with "extreme liberality." *Id.* (citing *Rosenberg Brothers & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960)) (per curiam). Leave to amend should be granted freely "even if a plaintiff 's claims have previously been dismissed." *Hampton v. Steen*, No. 2:12-CV-00470-AA, 2017 WL 11573592, at *2 (D. Or. Nov. 13, 2017) (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir. 2002)).

Courts consider four factors when determining whether leave to amend should be granted: 1) prejudice to the opposing party; 2) bad faith; 3) futility of amendment; and 4) undue delay. *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *see also Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). Not all factors are equal and only when prejudice or bad faith is shown should leave to amend be denied. *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973). Leave to amend should not be denied based only on delay, *id.*, particularly when that delay is not caused by the party seeking amendment.

A court may deny leave to amend if the proposed amendment is futile or would be subject to dismissal.

Carrico v. City & Cnty. of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011). An amendment is "futile" if the complaint could not be saved by amendment. *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011). The court must determine whether the deficiencies in the pleadings "can be cured with additional allegations that are consistent with the challenged pleading and that do not contradict the allegations in the original complaint." *Id.* (quotation marks omitted). A party should be allowed to test his claim on the merits rather than on a motion to amend unless it appears beyond doubt that the proposed amended pleading would be subject to dismissal. *Roth v. Garcia Marquez*, 942 F.2d 617, 629 (9th Cir. 1991).

DISCUSSION

I. Ninth Circuit Mandate Permits Court to Consider Motion to Amend

In its interlocutory opinion, the Ninth Circuit remanded the case to this Court with instructions to dismiss. Plaintiffs maintain that the Ninth Circuit did not state in its instructions whether dismissal was with or without leave to amend, and therefore, this Court should freely grant leave to do so. Federal defendants assert that this Court must dismiss according to the rule of mandate and because any amendment would be futile.[2]

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2. There is no material dispute between the parties whether plaintiffs' amendments are in bad faith, prejudicial to defendants, or unduly delayed. Having considered those factors, this Court finds that none bar plaintiffs' request to amend.

Appendix E

Under the "rule of mandate," a lower court is unquestionably obligated to "execute the terms of a mandate." *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). Compliance with the rule of mandate "preserv[es] the hierarchical structure of the court system," *Thrasher*, 483 F.3d at 982, and thus constitutes a basic feature of the rule of law in an appellate scheme. But while "the mandate of an appellate court forecloses the lower court from reconsidering matters determined in the appellate court, it 'leaves to the district court any issue not expressly or impliedly disposed of on appeal.'" *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Stevens v. F/V Bonnie Doon*, 731 F.2d 1433, 1435 (9th Cir. 1984)).

"Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to file additional pleadings. . . . " *San Francisco Herring Ass'n v. Dep't of the Interior*, 946 F.3d 564, 574 (9th Cir. 2019) (quoting *Nguyen*, 792 F.2d at 1502; *see also Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988)). When mandate in the prior appeal did not expressly address the possibility of amendment and did not indicate a clear intent to deny amendment seeking to raise new issues not decided by the prior appeal, that prior opinion did not purport "to shut the courthouse doors." *San Francisco Herring Ass'n*, 946 F.3d at 574 (citing *Nguyen*, 792 F.2d at 1503).

In *San Francisco Herring Ass'n*, the Ninth Circuit discussed its issuance of a mandate in a prior appeal, which vacated the district court's order entering summary

judgment in the defendants' favor and directed the district court to dismiss the complaint. *See San Francisco Herring Ass'n v. U.S. Dep't of Interior*, 683 F. App'x 579, 581 (9th Cir. 2017) (vacating judgment and remanding case with instructions to dismiss for lack of subject matter jurisdiction). On remand, the district court allowed the plaintiff to seek leave to file a second amended complaint. The Ninth Circuit determined the district court correctly found that the mandate to dismiss did not prevent the plaintiff from seeking leave to re-plead. *San Francisco Herring Ass'n*, 946 F.3d 574. The court reasoned that in instructing to dismiss, it had been silent on whether the dismissal should be with or without leave to amend and did not preclude the plaintiff from filing new allegations. *Id.* at 572-574.

Here, this Court does not take lightly its responsibility under the rule of mandate. Rather, it considers plaintiffs' new factual allegations under the Declaratory Judgment Act, and amended request for relief in light of intervening recent precedent, to be a new issue that, while discussed, was not decided by the Ninth Circuit in the interlocutory appeal. Nor did the mandate expressly state that plaintiffs could not amend to replead their case—particularly where the opinion found a narrow deficiency with plaintiffs' pleadings on redressability. This Court therefore does not interpret the Ninth Circuit's instructions as mandating it "to shut the courthouse doors" on plaintiffs' case where they present newly amended allegations. *San Francisco Herring Ass'n*, 946 F.3d at 574.

Appendix E

II. Amendment is Not Futile

A. The Interlocutory Opinion

The Ninth Circuit recited the established rule that, to demonstrate Article III redressability, plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Juliana*, 947 F.3d at 1170. Redress need not be guaranteed, but it must be more than "merely speculative." *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Here, applying the above rule, the Ninth Circuit stated that a declaration alone is not relief "substantially likely to mitigate [plaintiffs'] asserted concrete injuries." *Juliana*, 947 F.3d at 1170. The court considered whether partial redress suffices to prove the first redressability prong, concluding that it likely does not, because even if plaintiffs obtained the sought relief and federal defendants ceased promoting fossil fuel, such would only ameliorate, rather than "solve global climate change." *Id. at* 1171.

Even so, the court did not decide that plaintiffs had failed to prove the first prong of redressability: the court stated, "[w]e are therefore skeptical that the first redressability prong is satisfied. But even *assuming that it is*, [plaintiffs] do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court." *Juliana*, 947 F.3d at 1171. (emphasis added).

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In addressing whether plaintiffs had proved the second prong, the court identified the "specific relief" plaintiffs sought was an injunction requiring federal defendants not only to cease permitting, authorizing, and subsidizing fossil fuel, but also to prepare a plan, subject to judicial monitoring, to draw down harmful emissions. That specific relief, the court determined, was not within the power of an Article III court to award. *Id.* The court explained that for the district court to "order, design, supervise, or implement" plaintiffs' requested remedial plan, any effective plan would require a "host of complex policy decisions" entrusted under constitutional separation of powers to the executive and legislative branches. *Id.* In essence, the court found plaintiffs' injuries beyond redress because, in its view, plaintiffs' requested relief requires the district court to evaluate "competing policy considerations" and supervise implementation over many years. *Id.* at 1171-73

Summarizing what the court did—and did not—identify as the legal defects in plaintiffs' case, the court did not decide whether plaintiffs' requested declaratory relief failed or satisfied the redressability requirement for standing, and did not consider that issue under *Uzuegbunam* or the Declaratory Judgment Act. Rather, the court resolved that plaintiffs failed to demonstrate redressability on grounds that plaintiffs' requested remedial and injunctive relief was beyond the power of an Article III court to provide. The court was also silent on whether dismissal was to be with or without leave to amend.

Appendix E

B. Plaintiffs' Proposed Amendments

Plaintiffs assert that their proposed amendments cure the defects the Ninth Circuit identified and that they should be given opportunity to amend. Plaintiffs explain that the amended allegations demonstrate that relief under the Declaratory Judgment Act alone would be substantially likely to provide partial redress of asserted and ongoing concrete injuries, and that partial redress is sufficient, even if further relief is later found unavailable.

Plaintiffs also amended their factual allegations directly linking how a declaratory judgment alone will redress of plaintiffs' individual ongoing injuries. (*See* doc. 514-2 ¶¶ 19-A, 22-A, 30-A, 34-A, 39-A, 43-A, 46-A, 49-A, 52-A, 56-A, 59-A, 62-A, 64-A, 67-A, 70-A, 72-A, 76-A, 80-A, 85-A, 88-A, 90-A.). Plaintiffs assert that declaratory relief is within a court's Article III power to provide. Plaintiffs also omitted the "specific relief" the Ninth Circuit majority found to be outside Article III authority to award. Among other deletions, plaintiffs eliminated their requests for this Court to order federal defendants to prepare and implement a remedial plan and prepare a list of U.S. CO_2 emissions. Plaintiffs also omitted their request for this Court to monitor and enforce the remedial plan.

Plaintiffs' Second Amended Complaint thus requests this Court to: (1) declare that the United States' national energy system violates and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law; (2) enter a judgment declaring the

United States' national energy system has violated and continues to violate the public trust doctrine; and (3) enter a judgment declaring that § 201 of the Energy Policy Act has violated and continues to violate the Fifth Amendment of the U.S. Constitution and plaintiffs' constitutional rights to substantive due process and equal protection of the law.

While declaratory relief was part of plaintiffs' prayer in the operative complaint, plaintiffs did not cite *Uzuegbunam*—recent authority affirming that partial declaratory relief satisfies redressability for purposes of Article III standing. Plaintiffs contend that they should be granted leave to amend based on the Supreme Court's holding that a request for nominal damages alone (a form of declaratory relief) satisfies the redressability element necessary for Article III standing, where the plaintiff 's claim is based on a completed violation of a legal right, and the plaintiff establishes the first two elements of standing. *Uzuegbunam*, 141 S. Ct. at 801-02.

C. Plaintiffs' Amended Pleadings Satisfy Redressability

This Court adamantly agrees with the Ninth Circuit that its ability to provide redress is animated by two inquiries, one of efficacy and one of power. *Juliana*, 947 F.3d at 1169. Plaintiffs' proposed amendments allege that a declaration under the Declaratory Judgment Act is substantially likely to remediate their ongoing injuries, and that such relief is within this Court's power to award.

Appendix E

1. Declaratory Relief Alone is Substantially Likely to Redress Injury

The court can grant declaratory relief in the first instance and later consider further necessary or proper relief, if warranted, under the Declaratory Judgment Act. 28 U.S.C. §§ 2201, *et seq.* "In a case of actual controversy within its jurisdiction, [ ] any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201. "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202.

The Supreme Court has long recognized that declaratory judgment actions can provide redressability, even where relief obtained is a declaratory judgment alone. Well-known cases involve the census, *Franklin v. Massachusetts*, 505 U.S. 788, 803, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992), and *Utah v. Evans*, 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002).

In each of the census cases, a state objected to the way the Census Bureau counted people and sued government officials. In *Franklin v. Massachusetts*, the Supreme Court stated, "For purposes of establishing standing," it did not need to decide whether injunctive relief against

was appropriate where "the injury alleged is likely to be redressed by declaratory relief" and the court could "assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision by the District Court." 505 U.S. at 803, 112 S.Ct. 2767.

In *Utah v. Evans*, the Supreme Court referenced *Franklin*, explaining that, in terms of its "standing" precedent, declaratory relief affects a change in legal status, and the practical consequence of that change would "amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." 536 U.S. 452, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002).

Similarly, the Supreme Court has determined that a plaintiff had standing to sue the Nuclear Regulatory Commission for a declaration that the Price-Anderson Act, which limited the liability of nuclear power companies, was unconstitutional. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 81, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

Other cases recognized the role of declaratory relief in resolving constitutional cases. *See*, *e.g.*, *Evers v. Dwyer*, 358 U.S. 202, 202-04, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958) (ongoing governmental enforcement of segregation laws created actual controversy for declaratory judgment); *Powell v. McCormack*, 395 U.S. 486, 499, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ("A court may grant declaratory

relief even though it chooses not to issue an injunction or mandamus.").

Finally, the Supreme Court held that, for the purpose of Article III standing, nominal damages—a form of declaratory relief—provide the necessary redress for a completed violation of a legal right, even where the underlying unlawful conduct had ceased. *Uzuegbunam*, — U.S. —, 141 S. Ct. 792, 802, 209 L.Ed.2d 94. *Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal or trivial.

Here, this Court notes that, in its determination of standing, the Ninth Circuit was "skeptical" that declaratory relief alone would remediate plaintiffs' injuries, *Juliana*, 947 F.3d at 1171. The court noted that even if all plaintiffs' requests for relief were granted against federal defendants, such would not solve the problem of climate change entirely. But for redressability under Article III standing, plaintiffs need not allege that a declaration alone would solve their every ill. To plead a justiciable case, a court need only evaluate "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007) (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)). There is nothing in § 2201 preventing a court from granting declaratory relief even if it is the only relief awarded.

In light of that determination, by pleading a claim under § 2201, plaintiffs establish that the text of the statute itself resolves the uncertainty posed by the Ninth Circuit, given that plaintiffs have established an active case and controversy showing injury and causation. Section 2201 also provides that declaratory relief may be granted "whether or not further relief is or could be sought." *Id.* Under the statute, the relief plaintiffs seek fits like a glove, where plaintiffs request consideration of declaratory relief independently of other forms of relief, such as an injunction. *See Steffel v. Thompson*, 415 U.S. 452, 475, 94 S.Ct. 1209, 39 L.Ed.2d 505, (1974) (stating in a different context that "regardless of whether injunctive relief may be appropriate, federal declaratory relief is not precluded."). This Court finds that plaintiffs' proposed amendments are not futile: a declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief.

2. Redress is Within Power of Article III Courts

It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78, 2 L.Ed. 60 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function

because the "judicial Power" is exclusively in the hands of Article III courts. U.S. Const. Art. III, § 1. The issue before this Court now is not to determine what relief, specifically, is in its power to provide. This Court need only decide whether plaintiffs' amendments—alleging that declaratory relief is within an Article III court's power to award—"would be subject to dismissal." *Carrico*, 656 F.3d 1002.

The Declaratory Judgment Act authorizes this Court's determination in its embrace of both constitutional and prudential concerns where the text is "deliberately cast in terms of permissive, rather than mandatory, authority." *Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 250, 73 S.Ct. 236, 97 L.Ed. 291 (1952) (J. Reed, concurring). The Act gives "federal courts competence to make a declaration of rights." *Pub. Affairs Associates v. Rickover*, 369 U.S. 111, 112, 82 S.Ct. 580, 7 L.Ed.2d 604 (1962). The Supreme Court has found it "consistent with the statute . . . to vest district courts with discretion in the first instance, because facts bearing on the usefulness of the declaratory judgment remedy, and the fitness of the case for resolution, are peculiarly within their grasp." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136, 127 S.Ct. 764, 166 L.Ed.2d 604 (2007).

Here, plaintiffs seek declaratory relief that "the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law." (Doc. 514-1 ¶ 1). This relief

is squarely within the constitutional and statutory power of Article III courts to grant. Such relief would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by federal defendants' ongoing policies and practices. Last, but not least, the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit. This Court finds that the complaint can be saved by amendment. *See Corinthian Colleges*, 655 F.3d at 995.

CONCLUSION

For the reasons stated above, plaintiffs' Motion to File a Second Amended Complaint, doc. 462, is GRANTED.

APPENDIX F

947 F.3d 1159

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-36082

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamel Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Plaintiffs-Appellees,

v.

Appendix F

UNITED STATES OF AMERICA; MARY B. NEUMAYR, in her capacity as Chairman of Council on Environmental Quality; MICK MULVANEY, in his official capacity as Director of the Office of Management and the Budget; KELVIN K. DROEGEMEIR, in his official capacity as Director of the Office of Science and Technology Policy; DAN BROUILLETTE, in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; DAVID L. BERNHARDT, in his official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ELAINE L. CHAO, in her official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; SONNY PERDUE, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; WILBUR ROSS, in his official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; MARK T. ESPER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; MICHAEL R. POMPEO, in his official capacity as Secretary of State; ANDREW WHEELER, in his official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Defendants-Appellants.

Filed: January 17, 2020

Appendix F

OPINION

Appeal from the United States District Court for the District of Oregon, Ann L. Aiken, District Judge, Presiding, D.C. No. 6:15-cv-01517-AA.

Before: Mary H. Murguia and Andrew D. Hurwitz, Circuit Judges, and Josephine L. Staton,* District Judge.

Dissent by Judge Staton

HURWITZ, Circuit Judge:

In the mid-1960s, a popular song warned that we were "on the eve of destruction."[1] The plaintiffs in this case have presented compelling evidence that climate change has brought that eve nearer. A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.

The plaintiffs claim that the government has violated their constitutional rights, including a claimed right under

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* The Honorable Josephine L. Staton, United States District Judge for the Central District of California, sitting by designation.

1. Barry McGuire, *Eve of Destruction, on* Eve of Destruction (Dunhill Records, 1965).

the Due Process Clause of the Fifth Amendment to a "climate system capable of sustaining human life." The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek—an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.

I.

The plaintiffs are twenty-one young citizens, an environmental organization, and a "representative of future generations." Their original complaint named as defendants the President, the United States, and federal agencies (collectively, "the government"). The operative complaint accuses the government of continuing to "permit, authorize, and subsidize" fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs. Some plaintiffs claim psychological harm, others impairment to recreational interests, others exacerbated medical conditions, and others damage to property. The complaint asserts violations of: (1) the plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine. The plaintiffs seek declaratory relief and an injunction

ordering the government to implement a plan to "phase out fossil fuel emissions and draw down excess atmospheric [carbon dioxide]."[2]

The district court denied the government's motion to dismiss, concluding that the plaintiffs had standing to sue, raised justiciable questions, and stated a claim for infringement of a Fifth Amendment due process right to a "climate system capable of sustaining human life." The court defined that right as one to be free from catastrophic climate change that "will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem." The court also concluded that the plaintiffs had stated a viable "danger-creation due process claim" arising from the government's failure to regulate third-party emissions. Finally, the court held that the plaintiffs had stated a public trust claim grounded in the Fifth and the Ninth Amendments.

The government unsuccessfully sought a writ of mandamus. *In re United States*, 884 F.3d 830, 837-38 (9th Cir. 2018). Shortly thereafter, the Supreme Court denied the government's motion for a stay of proceedings.

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2. The plaintiffs also assert that section 201 of the Energy Policy Act of 1992, Pub. L. No. 102-486, § 201, 106 Stat. 2776, 2866 (codified at 15 U.S.C. § 717b(c)), which requires expedited authorization for certain natural gas imports and exports "without modification or delay," is unconstitutional on its face and as applied. The plaintiffs also challenge DOE/FE Order No. 3041, which authorizes exports of liquefied natural gas from the proposed Jordan Cove terminal in Coos Bay, Oregon.

United States v. U.S. Dist. Court for Dist. of Or., 139 S. Ct. 1, 201 L. Ed. 2d 1112 (2018). Although finding the stay request "premature," the Court noted that the "breadth of respondents' claims is striking . . . and the justiciability of those claims presents substantial grounds for difference of opinion." *Id.*

The government then moved for summary judgment and judgment on the pleadings. The district court granted summary judgment on the Ninth Amendment claim, dismissed the President as a defendant, and dismissed the equal protection claim in part.[3] But the court otherwise denied the government's motions, again holding that the plaintiffs had standing to sue and finding that they had presented sufficient evidence to survive summary judgment. The court also rejected the government's argument that the plaintiffs' exclusive remedy was under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702 *et seq.*

The district court initially declined the government's request to certify those orders for interlocutory appeal. But, while considering a second mandamus petition from the government, we invited the district court to revisit certification, noting the Supreme Court's justiciability concerns. *United States v. U.S. Dist. Court for the Dist. of Or.*, No. 18-73014, Dkt. 3; *see In re United States*, 139 S. Ct. 452, 453, 202 L. Ed. 2d 344 (2018) (reiterating justiciability concerns in denying a subsequent stay application from the

3. The court found that age is not a suspect class, but allowed the equal protection claim to proceed on a fundamental rights theory.

government). The district court then reluctantly certified the orders denying the motions for interlocutory appeal under 28 U.S.C. § 1292(b) and stayed the proceedings, while "stand[ing] by its prior rulings . . . as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States*, No. 6:15-cv-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). We granted the government's petition for permission to appeal.

II.

The plaintiffs have compiled an extensive record, which at this stage in the litigation we take in the light most favorable to their claims. *See Plumhoff v. Rickard*, 572 U.S. 765, 768, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014). The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace. It documents that since the dawn of the Industrial Age, atmospheric carbon dioxide has skyrocketed to levels not seen for almost three million years. For hundreds of thousands of years, average carbon concentration fluctuated between 180 and 280 parts per million. Today, it is over 410 parts per million and climbing. Although carbon levels rose gradually after the last Ice Age, the most recent surge has occurred more than 100 times faster; half of that increase has come in the last forty years.

Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked. Temperatures have already risen 0.9 degrees Celsius

above pre-industrial levels and may rise more than 6 degrees Celsius by the end of the century. The hottest years on record all fall within this decade, and each year since 1997 has been hotter than the previous average. This extreme heat is melting polar ice caps and may cause sea levels to rise 15 to 30 feet by 2100. The problem is approaching "the point of no return." Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.

The record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions. As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate, global temperatures, sea levels, and other stratospheric properties. In 1983, an Environmental Protection Agency ("EPA") report projected an increase of 2 degrees Celsius by 2040, warning that a "wait and see" carbon emissions policy was extremely risky. And, in the 1990s, the EPA implored the government to act before it was too late. Nonetheless, by 2014, U.S. fossil fuel emissions had climbed to 5.4 billion metric tons, up substantially from 1965. This growth shows no signs of abating. From 2008 to 2017, domestic petroleum and natural gas production increased by nearly 60%, and the country is now expanding oil and gas extraction four times faster than any other nation.

The record also establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes

fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land.[4]

A.

The government by and large has not disputed the factual premises of the plaintiffs' claims. But it first argues that those claims must proceed, if at all, under the APA. We reject that argument. The plaintiffs do not claim that any individual agency action exceeds statutory authorization or, taken alone, is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A), (C). Rather, they contend that the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions, *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890-91, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990), the plaintiffs cannot effectively pursue their constitutional claims—whatever their merits—under that statute.

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4. The programs and policies identified by the plaintiffs include: (1) the Bureau of Land Management's authorization of leases for 107 coal tracts and 95,000 oil and gas wells; (2) the Export-Import Bank's provision of $14.8 billion for overseas petroleum projects; (3) the Department of Energy's approval of over 2 million barrels of crude oil imports; (4) the Department of Agriculture's approval of timber cutting on federal land; (5) the undervaluing of royalty rates for federal leasing; (6) tax subsidies for purchasing fuel-inefficient sport-utility vehicles; (7) the "intangible drilling costs" and "percentage depletion allowance" tax code provisions, 26 U.S.C. §§ 263(c), 613; and (8) the government's use of fossil fuels to power its own buildings and vehicles.

The defendants argue that the APA's "comprehensive remedial scheme" for challenging the constitutionality of agency actions implicitly bars the plaintiffs' freestanding constitutional claims. But, even if some constitutional challenges to agency action must proceed through the APA, forcing all constitutional claims to follow its strictures would bar plaintiffs from challenging violations of constitutional rights in the absence of a discrete agency action that caused the violation. *See Sierra Club v. Trump*, 929 F.3d 670, 694, 696 (9th Cir. 2019) (stating that plaintiffs could "bring their challenge through an equitable action to enjoin unconstitutional official conduct, or under the judicial review provisions of the [APA]"); *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1172 (9th Cir. 2017) (holding "that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's 'final agency action' limitation applies only to APA claims"). Because denying "any judicial forum for a colorable constitutional claim" presents a "serious constitutional question," Congress's intent through a statute to do so must be clear. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12, 106 S. Ct. 2133, 90 L. Ed. 2d 623 (1986)); *see also Allen v. Milas*, 896 F.3d 1094, 1108 (9th Cir. 2018) ("After *Webster*, we have assumed that the courts will be open to review of constitutional claims, even if they are closed to other claims."). Nothing in the APA evinces such an intent.[5] Whatever the merits of the

5. The government relies upon *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328-29, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74-

plaintiffs' claims, they may proceed independently of the review procedures mandated by the APA. *See Sierra Club*, 929 F.3d at 698-99 ("Any constitutional challenge that Plaintiffs may advance under the APA would exist regardless of whether they could also assert an APA claim . . . . [C]laims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA."); *Navajo Nation*, 876 F.3d at 1170 (explaining that certain constitutional challenges to agency action are "not grounded in the APA").

B.

The government also argues that the plaintiffs lack Article III standing to pursue their constitutional claims. To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir. 2011). A plaintiff need only establish a genuine dispute as to these requirements to survive summary judgment. *See Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

76, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), both of which held that statutory remedial schemes implicitly barred freestanding equitable claims. Neither case, however, involved claims by the plaintiffs that the federal government was violating their constitutional rights. *See Armstrong*, 575 U.S. at 323-24 (claiming that state officials had violated a federal statute); *Seminole Tribe*, 517 U.S. at 51-52 (same).

Appendix F

1.

The district court correctly found the injury requirement met. At least some plaintiffs claim concrete and particularized injuries. Jaime B., for example, claims that she was forced to leave her home because of water scarcity, separating her from relatives on the Navajo Reservation. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2416, 201 L. Ed. 2d 775 (2018) (finding separation from relatives to be a concrete injury). Levi D. had to evacuate his coastal home multiple times because of flooding. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070-71 (9th Cir. 2011) (finding diminution in home property value to be a concrete injury). These injuries are not simply "'conjectural' or 'hypothetical;'" at least some of the plaintiffs have presented evidence that climate change is affecting them now in concrete ways and will continue to do so unless checked. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990)); *cf. Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 478 (D.C. Cir. 2009) (finding no standing because plaintiffs could "only aver that any significant adverse effects of climate change 'may' occur at some point in the future").

The government argues that the plaintiffs' alleged injuries are not particularized because climate change affects everyone. But, "it does not matter how many persons have been injured" if the plaintiffs' injuries are "concrete and personal." *Massachusetts v. EPA*, 549 U.S.

497, 517, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (quoting *Lujan*, 504 U.S. at 581 (Kennedy, J., concurring)); *see also Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) ("[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance.") (alteration in original) (quoting *Jewel*, 673 F.3d at 909). And, the Article III injury requirement is met if only one plaintiff has suffered concrete harm. *See Hawaii*, 138 S. Ct. at 2416; *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint. . . . For all relief sought, there must be a litigant with standing.").

2.

The district court also correctly found the Article III causation requirement satisfied for purposes of summary judgment. Causation can be established "even if there are multiple links in the chain," *Mendia v. Garcia*, 768 F.3d 1009, 1012 (9th Cir. 2014), as long as the chain is not "hypothetical or tenuous," *Maya*, 658 F.3d at 1070 (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002), *amended on denial of reh'g*, 312 F.3d 416 (9th Cir. 2002)). The causal chain here is sufficiently established. The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation. A significant portion of those emissions occur in this country; the United States accounted for over 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%. *See Massachusetts*, 549 U.S. at 524-25 (finding that emissions

amounting to about 6% of the worldwide total showed cause of alleged injury "by any standard"). And, the plaintiffs' evidence shows that federal subsidies and leases have increased those emissions. About 25% of fossil fuels extracted in the United States come from federal waters and lands, an activity that requires authorization from the federal government. *See* 30 U.S.C. §§ 181-196 (establishing legal framework governing the disposition of fossil fuels on federal land), § 201 (authorizing the Secretary of the Interior to lease land for coal mining).

Relying on *Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1141-46 (9th Cir. 2013), the government argues that the causal chain is too attenuated because it depends in part on the independent actions of third parties. *Bellon* held that the causal chain between local agencies' failure to regulate five oil refineries and the plaintiffs' climate-change related injuries was "too tenuous to support standing" because the refineries had a "scientifically indiscernible" impact on climate change. *Id.* at 1143-44. But the plaintiffs here do not contend that their injuries were caused by a few isolated agency decisions. Rather, they blame a host of federal policies, from subsidies to drilling permits, spanning "over 50 years," and direct actions by the government. There is at least a genuine factual dispute as to whether those policies were a "substantial factor" in causing the plaintiffs' injuries. *Mendia*, 768 F.3d at 1013 (quoting *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001)).

3.

The more difficult question is whether the plaintiffs' claimed injuries are redressable by an Article III court. In analyzing that question, we start by stressing what the plaintiffs do and do not assert. They do not claim that the government has violated a statute or a regulation. They do not assert the denial of a procedural right. Nor do they seek damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* Rather, their sole claim is that the government has deprived them of a substantive constitutional right to a "climate system capable of sustaining human life," and they seek remedial declaratory and injunctive relief.

Reasonable jurists can disagree about whether the asserted constitutional right exists. *Compare Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250-53 (E.D. Pa. 2019) (finding no constitutional right), *with Juliana*, 217 F. Supp. 3d at 1248-50; *see also In re United States*, 139 S. Ct. at 453 (reiterating "that the 'striking' breadth of plaintiffs' below claims 'presents substantial grounds for difference of opinion'"). In analyzing redressability, however, we assume its existence. *See M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018). But that merely begins our analysis, because "not all meritorious legal claims are redressable in federal court." *Id.* To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award. *Id.* Redress need not be guaranteed, but it must be more than "merely speculative." *Id.* (quoting *Lujan*, 504 U.S. at 561).

The plaintiffs first seek a declaration that the government is violating the Constitution. But that relief alone is not substantially likely to mitigate the plaintiffs' asserted concrete injuries. A declaration, although undoubtedly likely to benefit the plaintiffs psychologically, is unlikely by itself to remediate their alleged injuries absent further court action. *See Clean Air Council*, 362 F. Supp. 3d at 246, 249; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury."); *see also Friends of the Earth*, 528 U.S. at 185 ("[A] plaintiff must demonstrate standing separately for each form of relief sought.").

The crux of the plaintiffs' requested remedy is an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions. The plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress, *see, e.g.*, 30 U.S.C. § 201 (authorizing the Secretary of the Interior to lease land for coal mining), but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands, *see* U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of

and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

As an initial matter, we note that although the plaintiffs contended at oral argument that they challenge only affirmative activities by the government, an order simply enjoining those activities will not, according to their own experts' opinions, suffice to stop catastrophic climate change or even ameliorate their injuries.[6] The plaintiffs' experts opine that the federal government's leases and subsidies have contributed to global carbon emissions. But they do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth. Nor does any expert contend that elimination of the challenged pro-carbon fuels programs would by itself prevent further injury to the plaintiffs. Rather, the record shows that many of the emissions causing climate change happened decades ago or come from foreign and non-governmental sources.

Indeed, the plaintiffs' experts make plain that reducing the global consequences of climate change demands much more than cessation of the government's promotion of fossil fuels. Rather, these experts opine that such a result calls for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world. One expert opines that atmospheric carbon reductions must come "largely via

6. The operative complaint, however, also seems to challenge the government's inaction.

reforestation," and include rapid and immediate decreases in emissions from many sources. "[L]eisurely reductions of one of two percent per year," he explains, "will not suffice." Another expert has opined that although the required emissions reductions are "technically feasible," they can be achieved only through a comprehensive plan for "nearly complete decarbonization" that includes both an "unprecedently rapid build out" of renewable energy and a "sustained commitment to infrastructure transformation over decades." And, that commitment, another expert emphasizes, must include everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft.

The plaintiffs concede that their requested relief will not alone solve global climate change, but they assert that their "injuries would be to some extent ameliorated." Relying on *Massachusetts v. EPA*, the district court apparently found the redressability requirement satisfied because the requested relief would likely slow or reduce emissions. *See* 549 U.S. at 525-26. That case, however, involved a procedural right that the State of Massachusetts was allowed to assert "without meeting all the normal standards for redressability;" in that context, the Court found redressability because "there [was] some possibility that the requested relief [would] prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 517-18, 525-26 (quoting *Lujan*, 504 U.S. at 572 n.7). The plaintiffs here do not assert a procedural right, but rather a substantive due process claim.[7]

7. The dissent reads *Massachusetts* to hold that "a perceptible reduction in the advance of climate change is sufficient to redress

We are therefore skeptical that the first redressability prong is satisfied. But even assuming that it is, the plaintiffs do not surmount the remaining hurdle—establishing that the specific relief they seek is within the power of an Article III court. There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, both as a policy matter in general and a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches. *See Brown*, 902 F.3d at 1086 (finding the plaintiff's requested declaration requiring the government to issue driver cards "incompatible with democratic principles embedded in the structure of the Constitution"). These decisions range, for

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a plaintiff's climate change-induced harms." Diss. at 1182. But *Massachusetts* "permitted a State to challenge EPA's refusal to regulate greenhouse gas emissions," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420, 131 S. Ct. 2527, 180 L. Ed. 2d 435 (2011), finding that as a sovereign it was "entitled to special solicitude in [the] standing analysis," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2664 n.10, 192 L. Ed. 2d 704 (2015) (quoting *Massachusetts*, 549 U.S. at 520). Here, in contrast, the plaintiffs are not sovereigns, and a substantive right, not a procedural one, is at issue. *See Massachusetts*, 549 U.S. at 517-21, 525-26; *see also Lujan*, 504 U.S. at 572 n.7 ("There is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." *Collins v. City of Harker Heights*, 503 U.S. 115, 128-29, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992); *see Lujan*, 504 U.S. at 559-60 ("[S]eparation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts.").

The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best "phase out fossil fuel emissions and draw down excess atmospheric CO2." To be sure, in some circumstances, courts may order broad injunctive relief while leaving the "details of implementation" to the government's discretion. *Brown v. Plata*, 563 U.S. 493, 537-38, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). But, even under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking. And inevitably, this kind of plan will demand action not only by the Executive, but also by Congress. Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs' view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less

robust approach to addressing climate change than the plaintiffs believe is necessary. "But we cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" *Hawaii*, 138 S. Ct. at 2421 (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S. Ct. 431, 92 L. Ed. 568 (1948)). And, given the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades. *See Nat. Res. Def. Council, Inc. v. EPA*, 966 F.2d 1292, 1300 (9th Cir. 1992) ("Injunctive relief could involve extraordinary supervision by this court. . . . [and] may be inappropriate where it requires constant supervision.").[8]

8. However belatedly, the political branches are currently debating such action. Many resolutions and plans have been introduced in Congress, ranging from discrete measures to encourage clean energy innovation to the "Green New Deal" and comprehensive proposals for taxing carbon and transitioning all sectors of the economy away from fossil fuels. *See, e.g.*, H.R. Res. 109, 116th Cong. (2019); S.J. Res. 8, 116th Cong. (2019); Enhancing Fossil Fuel Energy Carbon Technology Act, S. 1201, 116th Cong. (2019); Climate Action Now Act, H.R. 9, 116th Cong. (2019); Methane Waste Prevention Act, H.R. 2711, 116th Cong. (2019); Clean Energy Standard Act, S. 1359, 116th Cong. (2019); National Climate Bank Act, S. 2057, 116th Cong. (2019); Carbon Pollution Transparency Act, S. 1745, 116th Cong. (2019); Leading Infrastructure for Tomorrow's America Act, H.R. 2741, 116th Cong. (2019); Buy Clean Transparency Act, S. 1864, 116th Cong. (2019); Carbon Capture Modernization Act, H.R. 1796, 116th Cong. (2019); Challenges & Prizes for Climate Act, H.R. 3100, 116th Cong. (2019); Energy Innovation and Carbon Dividend Act, H.R. 763, 116th Cong. (2019); Climate Risk Disclosure Act, S. 2075, 116th Cong. (2019); Clean Energy for America Act, S. 1288, 116th Cong. (2019). The proposed legislation, consistent

As the Supreme Court recently explained, "a constitutional directive or legal standards" must guide the courts' exercise of equitable power. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508, 204 L. Ed. 2d 931 (2019). *Rucho* found partisan gerrymandering claims presented political questions beyond the reach of Article III courts. *Id.* at 2506-07. The Court did not deny extreme partisan gerrymandering can violate the Constitution. *See id.* at 2506; *id.* at 2514-15 (Kagan, J., dissenting). But, it concluded that there was no "limited and precise" standard discernible in the Constitution for redressing the asserted violation. *Id.* at 2500. The Court rejected the plaintiffs' proposed standard because unlike the one-person, one-vote rule in vote dilution cases, it was not "relatively easy to administer as a matter of math." *Id.* at 2501.

Rucho reaffirmed that redressability questions implicate the separation of powers, noting that federal courts "have no commission to allocate political power and influence" without standards to guide in the exercise of such authority. *See id.* at 2506-07, 2508. Absent those standards, federal judicial power could be "unlimited in scope and duration," and would inject "the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role." *Id.* at 2507; *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014) (noting the

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with the opinions of the plaintiffs' experts, envisions that tackling this global problem involves the exercise of discretion, trade-offs, international cooperation, private-sector partnerships, and other value judgments ill-suited for an Article III court.

"separation-of-powers principles underlying" standing doctrine); *Brown*, 902 F.3d at 1087 (stating that "in the context of Article III standing, . . . federal courts must respect their 'proper—and properly limited—role . . . in a democratic society'" (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929, 201 L. Ed. 2d 313 (2018)). Because "it is axiomatic that 'the Constitution contemplates that democracy is the appropriate process for change,'" *Brown*, 902 F.3d at 1087 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605, 192 L. Ed. 2d 609 (2015)), some questions—even those existential in nature—are the province of the political branches. The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage. *See* 139 S. Ct. at 2500-02. It is impossible to reach a different conclusion here.

The plaintiffs' experts opine that atmospheric carbon levels of 350 parts per million are necessary to stabilize the global climate. But, even accepting those opinions as valid, they do not suggest how an order from this Court can achieve that level, other than by ordering the government to develop a plan. Although the plaintiffs' invitation to get the ball rolling by simply ordering the promulgation of a plan is beguiling, it ignores that an Article III court will thereafter be required to determine whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a "climate system capable of sustaining human life." We doubt that any such plan can be supervised or enforced by an Article III court. And, in the end, any plan is only as good as the court's power to enforce it.

C.

Our dissenting colleague quite correctly notes the gravity of the plaintiffs' evidence; we differ only as to whether an Article III court can provide their requested redress. In suggesting that we can, the dissent reframes the plaintiffs' claimed constitutional right variously as an entitlement to "the country's perpetuity," Diss. at 1176–78, 1178–79, or as one to freedom from "the amount of fossil-fuel emissions that will irreparably devastate our Nation," *id.* at 1187. But if such broad constitutional rights exist, we doubt that the plaintiffs would have Article III standing to enforce them. Their alleged individual injuries do not flow from a violation of these claimed rights. Indeed, any injury from the dissolution of the Republic would be felt by all citizens equally, and thus would not constitute the kind of discrete and particularized injury necessary for Article III standing. *See Friends of the Earth*, 528 U.S. at 180-81. A suit for a violation of these reframed rights, like one for a violation of the Guarantee Clause, would also plainly be nonjusticiable. *See, e.g., Rucho*, 139 S. Ct. at 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.") (citing *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149, 32 S. Ct. 224, 56 L. Ed. 377 (1912)); *Luther v. Borden*, 48 U.S. 1, 36-37, 39, 12 L. Ed. 581 (1849).

More importantly, the dissent offers no metrics for judicial determination of the level of climate change that would cause "the willful dissolution of the Republic," Diss. at 1179, nor for measuring a constitutionally acceptable

"perceptible reduction in the advance of climate change," *id.* at 1182. Contrary to the dissent, we cannot find Article III redressability requirements satisfied simply because a court order might "postpone[] the day when remedial measures become insufficiently effective." *Id.* at 1182; *see Brown*, 902 F.3d at 1083 ("If, however, a favorable judicial decision would not require the defendant to redress the plaintiff's claimed injury, the plaintiff cannot demonstrate redressability[.]"). Indeed, as the dissent recognizes, a guarantee against government conduct that might threaten the Union—whether from political gerrymandering, nuclear proliferation, Executive misconduct, or climate change—has traditionally been viewed by Article III courts as "not separately enforceable." *Id.* at 1178. Nor has the Supreme Court recognized "the perpetuity principle" as a basis for interjecting the judicial branch into the policy-making purview of the political branches. *See id.* at 1180.

Contrary to the dissent, we do not "throw up [our] hands" by concluding that the plaintiffs' claims are nonjusticiable. *Id.* at 1175. Rather, we recognize that "Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges." *Stern v. Marshall*, 564 U.S. 462, 483, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011). Not every problem posing a threat—even a clear and present danger—to the American Experiment can be solved by federal judges. As Judge Cardozo once aptly warned, a judicial commission does not confer the power of "a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness;"

rather, we are bound "to exercise a discretion informed by tradition, methodized by analogy, disciplined by system.'" Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).[9]

The dissent correctly notes that the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals. But, although inaction by the Executive and Congress may affect the form of judicial relief ordered when there is Article III standing, it cannot bring otherwise nonjusticiable claims within the province of federal courts. *See Rucho*, 139 S. Ct. at 2507-08; *Gill*, 138 S. Ct. at 1929 ("'Failure of political will does not justify unconstitutional remedies.' . . . Our power as judges . . . rests not on the default of politically accountable officers, but is instead grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." (quoting *Clinton v. City of New York*, 524 U.S. 417, 449, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998) (Kennedy, J., concurring))); *Brown*, 902 F.3d at 1087 ("The *absence* of a law, however, has never been held to constitute a 'substantive result' subject to judicial review[.]").

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9. Contrary to the dissent, we do not find this to be a political question, although that doctrine's factors often overlap with redressability concerns. Diss. at ___–___; *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1192 (9th Cir. 2017) ("Whether examined under the . . . the redressability prong of standing, or the political question doctrine, the analysis stems from the same separation-of-powers principle—enforcement of this treaty provision is not committed to the judicial branch. Although these are distinct doctrines . . . there is significant overlap.").

The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action. Diss. at 1181–82, 1183–84, 1187–88. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.

III.

For the reasons above, we reverse the certified orders of the district court and remand this case to the district court with instructions to dismiss for lack of Article III standing.[10]

REVERSED.

10. The plaintiffs' motion for an injunction pending appeal, Dkt. 21, is **DENIED**. Their motions for judicial notice, Dkts. 134, 149, are **GRANTED**.

Appendix F

STATON, District Judge, dissenting:

In these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.

My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. And considering

plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province. For these reasons, I respectfully dissent.[1]

I.

As the majority recognizes, and the government does not contest, carbon dioxide ("CO_2") and other greenhouse gas ("GHG") emissions created by burning fossil fuels are devastating the planet. Maj. Op. at 1166–67. According to one of plaintiffs' experts, the inevitable result, absent immediate action, is "an inhospitable future . . . marked by rising seas, coastal city functionality loss, mass migrations, resource wars, food shortages, heat waves, mega-storms, soil depletion and desiccation, freshwater shortage, public health system collapse, and the extinction of increasing numbers of species."

1. I agree with the majority that plaintiffs need not bring their claims under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 801, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992); *Webster v. Doe*, 486 U.S. 592, 603-04, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988).

Even government scientists[2] project that, given current warming trends, sea levels will rise two feet by 2050, nearly four feet by 2070, over eight feet by 2100, 18 feet by 2150, and over 31 feet by 2200. To put that in perspective, a three-foot sea level rise will make two million American homes uninhabitable; a rise of approximately 20 feet will result in the total loss of Miami, New Orleans, and other coastal cities. So, as described by plaintiffs' experts, the injuries experienced by plaintiffs are the first small wave in an oncoming tsunami—now visible on the horizon of the not-so-distant future—that will destroy the United States as we currently know it.

What sets this harm apart from all others is not just its magnitude, but its irreversibility. The devastation might look and feel somewhat different if future generations could simply pick up the pieces and restore the Nation. But plaintiffs' experts speak of a certain level of global warming as "locking in" this catastrophic damage. Put more starkly by plaintiffs' expert, Dr. Harold R. Wanless, "[a]tmospheric warming will continue for some 30 years after we stop putting more greenhouse gasses into the atmosphere. But that warmed atmosphere will continue warming the ocean for centuries, and the accumulating heat in the oceans *will persist for millennia*" (emphasis added). Indeed, another of plaintiffs' experts echoes, "[t]he fact that GHGs dissipate very slowly from the atmosphere . . . and that the costs of taking CO_2 out of the atmosphere through non-biological carbon capture and storage are

2. NOAA, Technical Rep. NOS CO-OPS 083, Global and Regional Sea Level Rise Scenarios for the United States 23 (Jan. 2017).

very high means that *the consequences of GHG emissions should be viewed as effectively irreversible*" (emphasis added). In other words, "[g]iven the self-reinforcing nature of climate change," the tipping point may well have arrived, and we may be rapidly approaching the point of no return.

Despite countless studies over the last half century warning of the catastrophic consequences of anthropogenic greenhouse gas emissions, many of which the government conducted, the government not only failed to act but also "affirmatively promote[d] fossil fuel use in a host of ways." Maj. Op. at 1167. According to plaintiffs' evidence, our nation is crumbling—at our government's own hand—into a wasteland. In short, the government has directly facilitated an existential crisis to the country's perpetuity.[3]

II.

In tossing this suit for want of standing, the majority concedes that the children and young adults who brought suit have presented enough to proceed to trial on the first two aspects of the inquiry (injury in fact and traceability). But the majority provides two-and-a-half reasons for concluding that plaintiffs' injuries are not redressable. After detailing its "skeptic[ism]" that the relief sought could "suffice to stop catastrophic climate change or even ameliorate [plaintiffs'] injuries[,]" Maj. Op. at 1170, the majority concludes that, at any rate, a court would

3. My asteroid analogy would therefore be more accurate if I posited a scenario in which the government itself accelerated the asteroid towards the earth before shutting down our defenses.

lack any power to award it. In the majority's view, the relief sought is too great and unsusceptible to a judicially administrable standard.

To explain why I disagree, I first step back to define the interest at issue. While standing operates as a threshold issue distinct from the merits of the claim, "it often turns on the nature and source of the claim asserted." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). And, unlike the majority, I believe the government has more than just a nebulous "moral responsibility" to preserve the Nation. Maj. Op. at 1175.

A.

The Constitution protects the right to "life, liberty, and property, to free speech, a free press, [and] freedom of worship and assembly." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). Through "reasoned judgment," the Supreme Court has recognized that the Due Process Clause, enshrined in the Fifth and Fourteenth Amendments, also safeguards certain "interests of the person so fundamental that the [government] must accord them its respect." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2015). These include the right to marry, *Loving v. Virginia*, 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967), to maintain a family and rear children, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996), and to pursue an occupation of one's choosing, *Schware v. Bd. of Bar Exam.*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957). As fundamental rights, these "may not be submitted to vote; they depend on the outcome of no

elections." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736, 84 S. Ct. 1459, 12 L. Ed. 2d 632 (1964) (quoting *Barnette*, 319 U.S. at 638).

Some rights serve as the necessary predicate for others; their fundamentality therefore derives, at least in part, from the necessity to preserve other fundamental constitutional protections. *Cf., e.g., Timbs v. Indiana*, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019) (deeming a right fundamental because its deprivation would "undermine other constitutional liberties"). For example, the right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Because it is "preservative of all rights," the Supreme Court has long regarded suffrage "as a fundamental political right." *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S. Ct. 1064, 30 L. Ed. 220 (1886). This holds true even though the right to vote receives imperfect express protection in the Constitution itself: While several amendments proscribe the denial or abridgement of suffrage based on certain characteristics, the Constitution does not guarantee the right to vote *ab initio. See* U.S. Const. amends. XV, XIX, XXIV, XXVI; *cf.* U.S. Const. art. I, § 4, cl. 1.

Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a "guardian of all other rights," *Plyler v. Doe*, 457 U.S. 202, 217 n.15, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society . . . ." *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L.

Ed. 1049 (1941); *see also The Ku Klux Cases*, 110 U.S. 651, 657-58, 4 S. Ct. 152, 28 L. Ed. 274 (1884). And, of course, in our system, that organized society consists of the Union. Without it, all the liberties protected by the Constitution to live the good life are meaningless.

This observation is hardly novel. After securing independence, George Washington recognized that "the destiny of unborn millions" rested on the fate of the new Nation, cautioning that "whatever measures have a tendency to dissolve the Union, or contribute to violate or lessen the Sovereign Authority, ought to be considered as hostile to the Liberty and Independency of America[.]" President George Washington, Circular Letter of Farewell to the Army (June 8, 1783). Without the Republic's preservation, Washington warned, "there is a natural and necessary progression, from the extreme of anarchy to the extreme of Tyranny; and that arbitrary power is most easily established on the ruins of Liberty abused to licentiousness." *Id.*

When the Articles of the Confederation proved ill-fitting to the task of safeguarding the Union, the framers formed the Constitutional Convention with "the great object" of "preserv[ing] and perpetuat[ing]" the Union, for they believed that "the prosperity of America depended on its Union." The Federalist No. 2, at 19 (John Jay) (E. H. Scott ed., 1898); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787)[4] ("It appeared to be the

4. Available at https://founders.archives.gov/documents/Jefferson/01-12-02-0274.

sincere and unanimous wish of the Convention to cherish and preserve the Union of the States."). In pressing New York to ratify the Constitution, Alexander Hamilton spoke of the gravity of the occasion: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and welfare of the parts of which it is composed—the fate of an empire, in many respects the most interesting in the world." The Federalist No. 1, at 11 (Alexander Hamilton) (E. H. Scott ed., 1898). In light of this animating principle, it is fitting that the Preamble declares that the Constitution is intended to secure "the Blessings of Liberty" not just for one generation, but for all future generations—our "Posterity."

The Constitution's structure reflects this perpetuity principle. *See Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (examining how "[v]arious textual provisions of the Constitution assume" a structural principle). In taking the Presidential Oath, the Executive must vow to "preserve, protect and defend the Constitution of the United States," U.S. Const. art. II, § 1, cl. 8, and the Take Care Clause obliges the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. Likewise, though generally not separately enforceable, Article IV, Section 4 provides that the "United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence." U.S. Const. art. IV, § 4; *see also New York v. United States*, 505 U.S. 144, 184-85, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

Less than a century after the country's founding, the perpetuity principle undergirding the Constitution met its greatest challenge. Faced with the South's secession, President Lincoln reaffirmed that the Constitution did not countenance its own destruction. "[T]he Union of these States is perpetual[,]" he reasoned in his First Inaugural Address, because "[p]erpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination." President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861). In justifying this constitutional principle, Lincoln drew from history, observing that "[t]he Union is much older than the Constitution." *Id.* He reminded his fellow citizens, "one of the declared objects for ordaining and establishing the Constitution was 'to form a *more perfect* Union.'" *Id.* (emphasis added) (quoting U.S. Const. pmbl.). While secession manifested the existential threat most apparently contemplated by the Founders—political dissolution of the Union—the underlying principle applies equally to its physical destruction.

This perpetuity principle does not amount to "a right to live in a contaminant-free, healthy environment." *Guertin v. Michigan*, 912 F.3d 907, 922 (6th Cir. 2019). To be sure, the stakes can be quite high in environmental disputes, as pollution causes tens of thousands of premature deaths each year, not to mention disability and diminished quality of life.[5] Many abhor living in a polluted environment, and

5. *See, e.g.*, Andrew L. Goodkind et al., *Fine-Scale Damage Estimates of Particulate Matter Air Pollution Reveal Opportunities for Location-Specific Mitigation of Emissions, in* 116 Proceedings of

some pay with their lives. But mine-run environmental concerns "involve a host of policy choices that must be made by . . . elected representatives, rather than by federal judges interpreting the basic charter of government[.]" *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992). The perpetuity principle is not an environmental right at all, and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the Republic.[6]

That the principle is structural and implicit in our constitutional system does not render it any less enforceable. To the contrary, our Supreme Court has recognized that "[t]here are many [] constitutional doctrines that are not spelled out in the Constitution" but are nonetheless enforceable as "historically rooted principle[s] embedded in the text and structure of the Constitution." *Franchise Tax Bd. of California v. Hyatt*,

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the National Academy of Sciences 8775, 8779 (2019) (estimating that fine particulate matter caused 107,000 premature deaths in 2011).

6. Unwilling to acknowledge that the very nature of the climate crisis places this case in a category of one, the government argues that "the Constitution does not provide judicial remedies for every social and economic ill." For support, the government cites *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972), which held Oregon's wrongful detainer statute governing landlord/tenant disputes constitutional. The perpetuity principle, however, cabins the right and avoids any slippery slope. While the principle's goal is to preserve the most fundamental individual rights to life, liberty, and property, it is not triggered absent an existential threat to the country arising from a "point of no return" that is, at least in part, of the government's own making.

139 S. Ct. 1485, 1498-99, 203 L. Ed. 2d 768 (2019). For instance, the Constitution does not in express terms provide for judicial review, *Marbury v. Madison*, 5 U.S. 137, 176-77, 2 L. Ed. 60 (1803); sovereign immunity (outside of the Eleventh Amendment's explicit restriction), *Alden*, 527 U.S. at 735-36; the anticommandeering doctrine, *Murphy v. NCAA*, 138 S. Ct. 1461, 1477, 200 L. Ed. 2d 854 (2018); or the regimented tiers of scrutiny applicable to many constitutional rights, *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). Yet these doctrines, as well as many other implicit principles, have become firmly entrenched in our constitutional landscape. And, in an otherwise justiciable case, a private litigant may seek to vindicate such structural principles, for they "protect the individual as well" as the Nation. *See Bond v. United States*, 564 U.S. 211, 222, 225-26, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011); *INS. v. Chadha*, 462 U.S. 919, 935-36, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

In *Hyatt*, for instance, the Supreme Court held that a state could not be sued in another state's courts without its consent. Although nothing in the text of the Constitution expressly forbids such suits, the Court concluded that they contravened "the 'implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.'" *Hyatt*, 139 S. Ct. at 1492 (quoting *Nevada v. Hall*, 440 U.S. 410, 433, 99 S. Ct. 1182, 59 L. Ed. 2d 416 (1979) (Rehnquist, J., dissenting)). So too here.

Nor can the perpetuity principle be rejected simply because the Court has not yet had occasion to enforce it as a limitation on government conduct. Only over time, as the Nation confronts new challenges, are constitutional principles tested. For instance, courts did not recognize the anticommandeering doctrine until the 1970s because "[f]ederal commandeering of state governments [was] such a novel phenomenon." *Printz v. United States*, 521 U.S. 898, 925, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997). And the Court did not recognize that cell-site data fell within the Fourth Amendment until 2018. In so holding, the Court rejected "a 'mechanical interpretation' of the Fourth Amendment" because "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes[.]" *Carpenter v. United States*, 138 S. Ct. 2206, 2214, 201 L. Ed. 2d 507 (2018). Thus, it should come as no surprise that the Constitution's commitment to perpetuity only now faces judicial scrutiny, for never before has the United States confronted an existential threat that has not only gone unremedied but is actively backed by the government.

The mere fact that we have alternative means to enforce a principle, such as voting, does not diminish its constitutional stature. Americans can vindicate federalism, separation of powers, equal protection, and voting rights through the ballot box as well, but that does not mean these constitutional guarantees are not independently enforceable. By its very nature, the Constitution "withdraw[s] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them

as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638. When fundamental rights are at stake, individuals "need not await legislative action." *Obergefell*, 135 S. Ct. at 2605.

Indeed, in this *sui generis* circumstance, waiting is not an option. Those alive today are at perhaps the singular point in history where society (1) is scientifically aware of the impending climate crisis, and (2) can avoid the point of no return. And while democracy affords citizens the right "to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times[,]" *id.* (quoting *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 312, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014)), that process cannot override the laws of nature. Or, more colloquially, we can't shut the stable door after the horse has bolted.

As the last fifty years have made clear, telling plaintiffs that they must vindicate their right to a habitable United States through the political branches will rightfully be perceived as telling them they have no recourse. The political branches must often realize constitutional principles, but in a justiciable case or controversy, courts serve as the ultimate backstop. To this issue, I turn next.

B.

Of course, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996). So federal courts are not

free to address *every* grievance. "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Standing is "a doctrine rooted in the traditional understanding of a case or controversy," developed to "ensure that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016).

A case is fit for judicial determination only if the plaintiff has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); then citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). As to the first two elements, my colleagues and I agree: Plaintiffs present adequate evidence at this pre-trial stage to show particularized, concrete injuries to legally-protected interests, and they present further evidence to raise genuine disputes as to whether those injuries—at least in substantial part—are fairly traceable to the government's conduct at issue. *See* Maj. Op. at 1168–69. Because I find that plaintiffs have also established the third prong for standing, redressability, I conclude that plaintiffs' legal stake in this action suffices to invoke the adjudicative powers of the federal bench.

Appendix F

1.

"Redressability" concerns whether a federal court is capable of vindicating a plaintiff's legal rights. I agree with the majority that our ability to provide redress is animated by two inquiries, one of efficacy and one of power. Maj. Op. at 1169 (citing *M.S. v. Brown*, 902 F.3d 1076, 1083 (9th Cir. 2018)). First, as a causal matter, is a court order likely to actually remediate the plaintiffs' injury? If so, does the judiciary have the constitutional authority to levy such an order? *Id.*

Addressing the first question, my colleagues are skeptical that curtailing the government's facilitation of fossil-fuel extraction and combustion will ameliorate the plaintiffs' harms. *See* Maj. Op. at 1170–72. I am not, as the nature of the injury at stake informs the effectiveness of the remedy. *See Warth*, 422 U.S. at 500.

As described above, the right at issue is not to be entirely free from any climate change. Rather, plaintiffs have a constitutional right to be free from *irreversible and catastrophic climate change*. Plaintiffs have begun to feel certain concrete manifestations of this violation, ripening their case for litigation, but such prefatory harms are just the first barbs of an *ongoing* injury flowing from an *ongoing* violation of plaintiffs' rights. The bulk of the injury is yet to come. Therefore, practical redressability is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today—an admittedly tall order; it is instead measured by our ability to curb by some meaningful degree what the record shows to be

an otherwise inevitable march to the point of no return. Hence, the injury at issue is not climate change writ large; it is climate change beyond the threshold point of no return. As we approach that threshold, the significance of every emissions reduction is magnified.

The majority portrays any relief we can offer as just a drop in the bucket. *See* Maj. Op. at 1170–72. In a previous generation, perhaps that characterization would carry the day and we would hold ourselves impotent to address plaintiffs' injuries. But we are perilously close to an overflowing bucket. These final drops matter. *A lot*. Properly framed, a court order—even one that merely postpones the day when remedial measures become insufficiently effective—would likely have a real impact on preventing the impending cataclysm. Accordingly, I conclude that the court could do something to help the plaintiffs before us.

And "something" is all that standing requires. In *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007), the Supreme Court explicitly held that a non-negligible reduction in emissions—there, by regulating vehicles emissions—satisfied the redressability requirement of Article III standing:

> While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it. Because of the enormity of the potential consequences associated with manmade climate change, the

> fact that the effectiveness of a remedy might be delayed during the (relatively short) time it takes for a new motor-vehicle fleet to replace an older one is essentially irrelevant. Nor is it dispositive that developing countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century: A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.
>
> . . . .
>
> . . . The risk of catastrophic harm, though remote, is nevertheless real.

Id. at 525-26 (internal citation omitted).

In other words, under Article III, a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff's climate change-induced harms. Full stop. The majority dismisses this precedent because *Massachusetts v. EPA* involved a procedural harm, whereas plaintiffs here assert a purely substantive right. Maj. Op. at 1171. But this difference in posture does not affect the outcome.

While the redressability requirement is relaxed in the procedural context, that does not mean (1) we must engage in a similarly relaxed analysis whenever we invoke *Massachusetts v. EPA* or (2) we cannot rely on *Massachusetts v. EPA*'s substantive examination of the

relationship between government action and the course of climate change. Accordingly, here, we do not consider the likelihood that plaintiffs will prevail in any newly-awarded agency procedure, nor whether granting access to that procedure will redress plaintiffs' injury. *Cf. Massachusetts v. EPA*, 549 U.S. at 517-18; *Lujan*, 504 U.S. at 572 n.7. Rather, we assume plaintiffs *will* prevail—removing the procedural link from the causal chain—and we resume our traditional analysis to determine whether the desired outcome would in fact redress plaintiffs' harms.[7] In *Massachusetts v. EPA*, the remaining substantive inquiry was whether reducing emissions from fossil-fuel combustion would likely ameliorate climate change-induced injuries despite the global nature of climate change (regardless of whether renewed procedures were themselves likely to mandate such lessening). The Supreme Court unambiguously answered that question in the affirmative. That holding squarely applies to the instant facts,[8]

7. The presence of a procedural right is more critical when determining whether the first and second elements of standing are present. This is especially true where Congress has "define[d] injuries and articulate[d] chains of causation that will give rise to a case or controversy where none existed before" by conferring procedural rights that give certain persons a "stake" in an injury that is otherwise not their own. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)). But who seeks to vindicate an injury is irrelevant to the question of whether a court has the tools to relieve that injury.

8. Indeed, the majority has already acknowledged as much in finding plaintiffs' injuries traceable to the government's misconduct because the traceability and redressability inquiries are largely coextensive. *See* Maj. Op. at 1168–70; *see also Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1146 (2013) ("The Supreme Court has

rendering the absence of a procedural right here irrelevant. [9]

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clarified that the 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.' The two are distinct insofar as causality examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief.") (internal citation omitted). Here, where the requested relief is simply to stop the ongoing misconduct, the inquiries are nearly identical. *Cf. Allen v. Wright*, 468 U.S. 737, 753 n.19, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) ("[I]t is important to keep the inquiries separate" where "the relief requested goes well beyond the violation of law alleged."), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014); *see also infra* Part II.B.3.

9. Nor am I persuaded that *Massachusetts v. EPA* is distinguishable because of the relaxed standing requirements and "special solicitude" in cases brought by a state against the United States. *Massachusetts v. EPA*, 549 U.S. at 517-20. When *Massachusetts v. EPA* was decided, more than a decade ago, there was uncertainty and skepticism as to whether an individual could state a sufficiently definite climate change-induced harm based on gradually warming air temperatures and rising seas. But the Supreme Court sidestepped such questions of the *concreteness* of the plaintiffs' injuries by finding that "[Massachusetts's] stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Id.* at 519. Here and now, the plaintiffs submit *undisputed scientific evidence* that their distinct and discrete injuries are caused by climate change brought about by emissions from fossil-fuel combustion. They need not rely on the "special solicitude," *id.* at 520, of a state to be heard. Regardless, any distinction would go to the concreteness or particularity of plaintiffs' injuries and not to the issue of redressability.

2.

The majority laments that it cannot step into the shoes of the political branches, *see* Maj. Op. at 1175, but appears ready to yield even if those branches walk the Nation over a cliff. This deference-to-a-fault promotes separation of powers to the detriment of our countervailing constitutional mandate to intervene where the political branches run afoul of our foundational principles. Our tripartite system of government is often and aptly described as one of "checks and balances." The doctrine of standing preserves *balance* among the branches by keeping separate questions of general governance and those of specific legal entitlement. But the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs, even when—as frequently happens—it requires that we instruct the other branches as to the constitutional limitations on their power. Indeed, sometimes "the [judicial and governance] roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, . . . orders the alteration of an institutional organization or procedure that causes the harm." *Lewis*, 518 U.S. at 350; *cf. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982) ("Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not

suffered cognizable injury."). In my view, this Court must confront and reconcile this tension before deciding that thorny questions of standing preclude review in this case. And faithful application of our history and precedents reveals that a failure to do so leads to the wrong result.

Taking the long (but essential) way around, I begin first by acknowledging explicitly what the majority does not mention: our history plainly establishes an ambient presumption of judicial review to which separation-of-powers concerns provide a rebuttal under limited circumstances. Few would contest that "[i]t is emphatically the province and duty of the judicial department" to curb acts of the political branches that contravene those fundamental tenets of American life so dear as to be constitutionalized and thus removed from political whims. *See Marbury*, 5 U.S. at 177-78. This presumptive authority entails commensurate power to grant appropriate redress, as recognized in *Marbury*, "which effectively place[s] upon those who would deny the existence of an effective legal remedy the burden of showing why their case was special." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874, 198 L. Ed. 2d 290 (2017) (Breyer, J., dissenting). That is, "there must be something 'peculiar' (*i.e.*, special) about a case that warrants 'excluding the injured party from legal redress and placing it within that class of cases which come under the description of *damnum absque injuria*—a loss without an injury.'" *Id.* (cleaned up) (quoting *Marbury*, 5 U.S. at 163-64). In sum, although it is the plaintiffs' burden to establish injury in fact, causation, and redressability, it is the government's burden to establish why this otherwise-justiciable controversy implicates grander separation-of-powers concerns not already captured by

those requirements. We do not otherwise abdicate our duty to enforce constitutional rights.

Without explicitly laying this groundwork, the majority nonetheless suggests that this case is "special"—and beyond our redress—because plaintiffs' requested relief requires (1) the messy business of evaluating competing policy considerations to steer the government away from fossil fuels and (2) the intimidating task of supervising implementation over many years, if not decades. *See* Maj. Op. at 1171–73. I admit these are daunting tasks, but we are constitutionally empowered to undertake them. There is no justiciability exception for cases of great complexity and magnitude.

3.

I readily concede that courts must on occasion refrain from answering those questions that are truly reserved for the political branches, even where core constitutional precepts are implicated. This deference is known as the "political question doctrine," and its applicability is governed by a well-worn multifactor test that counsels judicial deference where there is:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution

> without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195-201, 132 S. Ct. 1421, 182 L. Ed. 2d 423 (2012) (discussing and applying *Baker* factors); *Vieth v. Jubelirer*, 541 U.S. 267, 277-90, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (same); *Nixon v. United States*, 506 U.S. 224, 228-38, 113 S. Ct. 732, 122 L. Ed. 2d 1 (1993) (same); *Chadha*, 462 U.S. at 940-43 (same).[10] In some sense, these factors are frontloaded in significance. "We have characterized the first three factors as 'constitutional limitations of a court's jurisdiction' and the other three factors as 'prudential considerations.'" *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1200 (9th

10. The political question doctrine was first conceived in *Marbury*. *See Marbury*, 5 U.S. at 165-66 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."). The modern incarnation of the doctrine has existed relatively unaltered since its exposition in *Baker* in 1962. Although the majority disclaims the applicability of the political question doctrine, *see* Maj. Op. at 1174–75, n.9, the opinion's references to the lack of discernable standards and its reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019), as a basis for finding this case nonjusticiable blur any meaningful distinction between the doctrines of standing and political question.

Cir. 2017) (quoting *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 981 (9th Cir. 2007)).[11] Moreover, "we have recognized that the first two are likely the most important." *Marshall Islands*, 865 F.3d at 1200 (citing *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005)). Yet, we have also recognized that the inquiry is highly case-specific, the factors "often collaps[e] into one another[,]" and any one factor of sufficient weight is enough to render a case unfit for judicial determination. *See Marshall Islands*, 865 F.3d at 1200 (first alteration in original) (quoting *Alperin*, 410 F.3d at 544). Regardless of any intra-factor flexibility and flow, however, there is a clear mandate to apply the political question doctrine both shrewdly and sparingly.

> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence. The doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.

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11. The six *Baker* factors have been characterized as "reflect[ing] three distinct justifications for withholding judgment on the merits of a dispute." *Zivotofsky v. Clinton*, 566 U.S. at 203 (Sotomayor, J., concurring). Under the first *Baker* factor, "abstention is warranted because the court lacks authority to resolve" "issue[s] whose resolution is textually committed to a coordinate political department[.]" *Id.* Under the second and third factors, abstention is warranted in "circumstances in which a dispute calls for decisionmaking beyond courts' competence[.]" *Id.* Under the final three factors, abstention is warranted where "prudence . . . counsel[s] against a court's resolution of an issue presented." *Id.* at 204.

Baker, 369 U.S. at 217; *see also Corrie*, 503 F.3d at 982 ("We will not find a political question 'merely because [a] decision may have significant political overtones.'") (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986)). Rather, when detecting the presence of a "political question," courts must make a "discriminating inquiry into the precise facts and posture of the particular case" and refrain from "resolution by any semantic cataloguing." *Baker*, 369 U.S. at 217.

Here, confronted by difficult questions on the constitutionality of *policy*, the majority creates a minefield of *politics* en route to concluding that we cannot adjudicate this suit. And the majority's map for navigating that minefield is *Rucho v. Common Cause*, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019), an inapposite case about gerrymandering. My colleagues conclude that climate change is too political for the judiciary to touch by likening it to the process of political representatives drawing political maps to elect other political representatives. I vehemently disagree.

The government does not address on appeal the district judge's reasoning that the first, third, fourth, fifth and sixth *Baker* factors do not apply here. Neither does the majority rely on any of these factors in its analysis. In relevant part, I find the opinion below both thorough and well-reasoned, and I adopt its conclusions. I note, however, that the absence of the first *Baker* factor—whether the Constitution textually delegates the relevant subject matter to another branch—is especially conspicuous. As

the district judge described, courts invoke this factor only where the Constitution makes an unambiguous commitment of responsibility to one branch of government. Very few cases turn on this factor, and almost all that do pertain to two areas of constitutional authority: foreign policy and legislative proceedings. *See, e.g., Marshall Islands*, 865 F.3d at 1200-01 (treaty enforcement); *Corrie*, 503 F.3d at 983 (military aid); *Nixon*, 506 U.S. at 234 (impeachment proceedings); *see also Davis v. Passman*, 442 U.S. 228, 235 n.11, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) ("[J]udicial review of congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate Clause[,] . . . [which is] a paradigm example of a textually demonstrable constitutional commitment of [an] issue to a coordinate political department.") (internal quotation marks omitted); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 135 S. Ct. 2076, 2086, 192 L. Ed. 2d 83 (2015) ("The text and structure of the Constitution grant the President the power to recognize foreign nations and governments.").

Since this matter has been under submission, the Supreme Court cordoned off an additional area from judicial review based in part on a textual commitment to another branch: partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2494-96.[12] Obviously, the Constitution

12. *Rucho* does not turn exclusively on the first *Baker* factor and acknowledges that there are some areas of districting that courts may police, notwithstanding the Elections Clause's "assign[ment] to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Rucho*,

does not explicitly address climate change. But neither does climate change *implicitly* fall within a recognized political-question area. As the district judge described, the questions of energy policy at stake here may have rippling effects on foreign policy considerations, but that is not enough to wholly exempt the subject matter from our review. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1238 (D. Or. 2016) ("[U]nlike the decisions to go to war, take action to keep a particular foreign leader in power, or give aid to another country, climate change policy is not *inherently*, or even primarily, a foreign policy decision."); *see also Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

Without endorsement from the constitutional text, the majority's theory is grounded exclusively in the second *Baker* factor: a (supposed) lack of clear judicial standards for shaping relief. Relying heavily on *Rucho*, the majority contends that we cannot formulate standards (1) to determine what relief "is sufficient to remediate the claimed constitutional violation" or (2) to "supervise[] or enforce[]" such relief. Maj. Op. at 1173.

The first point is a red herring. Plaintiffs submit ample evidence that there is a discernable "tipping point" at which the government's conduct turns from facilitating mere pollution to inducing an unstoppable cataclysm in violation of plaintiffs' rights. Indeed, the majority

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139 S. Ct. at 2495. Instead, *Rucho* holds that a combination of the text (as illuminated by historical practice) and absence of clear judicial standards precludes judicial review of excessively partisan gerrymanders. *See infra* Part II.B.4.

itself cites plaintiffs' evidence that "atmospheric carbon levels of 350 parts per million are necessary to stabilize the climate." *Id.* at 1173. This clear line stands in stark contrast to *Rucho*, which held that—even assuming an excessively partisan gerrymander was unconstitutional—no standards exist by which to determine *when a rights violation has even occurred*. There, "[t]he central problem [wa]s not determining whether a jurisdiction has engaged in partisan gerrymandering. It [wa]s determining when political gerrymandering has gone too far." *Rucho*, 139 S. Ct. at 2497 (internal quotation marks omitted); *see also id.* at 2498 ("[T]he question is one of degree: How to provide a standard for deciding how much partisan dominance is too much.") (internal quotation marks omitted); *id.* at 2499 ("If federal courts are to . . . adjudicat[e] partisan gerrymandering claims, they must be armed with a standard that can reliably differentiate unconstitutional from constitutional political gerrymandering.") (internal quotation marks and citation omitted).

Here, the right at issue is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation. That amount can be established by scientific evidence like that proffered by the plaintiffs. Moreover, we need not *definitively* determine that standard today. Rather, we need conclude only that plaintiffs have submitted sufficient evidence to create a genuine dispute as to whether such an amount can possibly be determined as a matter of scientific fact. Plaintiffs easily clear this bar. Of course, plaintiffs will have to carry their burden of proof to establish this fact in order to prevail at trial, but that issue is not before us. We must not get ahead of ourselves.

The procedural posture of this case also informs the question of oversight and enforcement. It appears the majority's real concerns lie not in the judiciary's ability to draw a line between lawful and unlawful conduct, but in our ability to equitably walk the government back from that line without wholly subverting the authority of our coequal branches. My colleagues take great issue with plaintiffs' request for a "plan" to reduce fossil-fuel emissions. I am not so concerned. At this stage, we need not promise plaintiffs the moon (or, more apropos, the earth in a habitable state). For purposes of standing, we need hold only that the trial court could fashion some sort of meaningful relief should plaintiffs prevail on the merits.[13]

Nor would any such remedial "plan" necessarily require the courts to muck around in policymaking to an impermissible degree; the *scope* and *number* of policies a court would have to reform to provide relief is irrelevant to the second *Baker* factor, which asks only if there are judicially discernable standards to guide that reformation. Indeed, our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example,

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13. It is possible, of course, that the district court ultimately concludes that it is unable to provide meaningful redress based on the facts proved at trial, but trial has not yet occurred. Our present occasion is to decide only whether plaintiffs have raised a genuine dispute as to the judiciary's ability to provide meaningful redress under *any* subset of the facts at issue today. *See* Maj. Op. at 1168 (citing *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002)).

the Court ordered the overhaul of prisons in the Nation's most populous state. *See Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law.[14] *See Brown v. Bd. of Educ.* (*Brown I*), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake:

> To effectuate [the plaintiffs'] interest[s] may call for elimination of a variety of obstacles in making the transition to school systems

14. In contrast, we are haunted by the days we declined to curtail the government's approval of invidious discrimination in public life, *see Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S. Ct. 1138, 41 L. Ed. 256 (1896) (Harlan, J., dissenting) ("[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."), and neglected to free thousands of innocents prejudicially interned by their own government without cause, *see Trump v. Hawaii*, 138 S. Ct. 2392, 2423, 201 L. Ed. 2d 775 (2018) ("*Korematsu* was gravely wrong the day it was decided[.]").

> operated in accordance with the constitutional principles set forth in [*Brown I*]. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.
>
> . . . [T]he courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.

Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 300-01, 75 S. Ct. 753, 99 L. Ed. 1083 (1955).

As we are all too aware, it took decades to even partially realize *Brown*'s promise, but the slow churn

of constitutional vindication did not dissuade the *Brown* Court, and it should not dissuade us here. Plaintiffs' request for a "plan" is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards. Busing mandates, facilities allocation, and district-drawing were all "complex policy decisions" faced by post-*Brown* trial courts, *see* Maj. Op. at 1171, and I have no doubt that disentangling the government from promotion of fossil fuels will take an equally deft judicial hand. Mere complexity, however, does not put the issue out of the courts' reach. Neither the government nor the majority has articulated why the courts could not weigh scientific and prudential considerations—as we often do—to put the government on a path to constitutional compliance.

The majority also expresses concern that any remedial plan would require us to compel "the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change[.]" *Id.* at 1171. Even if the operative complaint is fairly read as requesting an affirmative scheme to address *all* drivers of climate change, however caused, *see id.* at 1170 n.6., such an overbroad request does not doom our ability to redress those drivers implicated by the conduct at issue here. Courts routinely grant plaintiffs less than the full gamut

of requested relief, and our inability to compel legislation that addresses emissions beyond the scope of this case—such as those purely in the private sphere or within the control of foreign governments—speaks nothing to our ability to enjoin the government from exercising its discretion in violation of plaintiffs' constitutional rights.

4.

In sum, resolution of this action requires answers only to scientific questions, not political ones. And plaintiffs have put forth sufficient evidence demonstrating their entitlement to have those questions addressed at trial in a court of law.

As discussed above, the majority reaches the opposite conclusion not by marching purposefully through the *Baker* factors, which carve out a narrow set of nonjusticiable *political* cases, but instead by broadly invoking *Rucho* in a manner that would cull from our dockets any case that presents administrative issues "too difficult for the judiciary to manage." Maj. Op. at 1173. That simply is not the test. Difficult questions are not necessarily political questions and, beyond reaching the wrong conclusion in this case, the majority's application of *Rucho* threatens to eviscerate judicial review in a swath of complicated but plainly apolitical contexts.

Rucho's limitations should be apparent on the face of that opinion. *Rucho* addresses the political process itself, namely whether the metastasis of partisan politics

has unconstitutionally invaded the drawing of political districts within states. Indeed, the *Rucho* opinion characterizes the issue before it as a request for the Court to reallocate political power between the major parties. *Rucho*, 139 S. Ct. at 2502, 2507, 2508. *Baker* factors aside, *Rucho* surely confronts fundamentally "political" questions in the common sense of the term. Nothing about climate change, however, is inherently political. The majority is correct that redressing climate change will require consideration of scientific, economic, energy, and other policy factors. But that endeavor does not implicate the way we elect representatives, assign governmental powers, or otherwise structure our polity.

Regardless, we do not limit our jurisdiction based on common parlance. Instead, legal and constitutional principles define the ambit of our authority. In the present case, the *Baker* factors provide the relevant guide and further distinguish *Rucho*. As noted above, *Rucho*'s holding that policing partisan gerrymandering is beyond the courts' competence rests heavily on the first *Baker* factor, *i.e.*, the textual and historical delegation of electoral-district drawing to state legislatures. The *Rucho* Court decided it could not discern mathematical standards to navigate a way out of that particular political thicket. It did not, however, hold that mathematical (or scientific) difficulties in creating appropriate standards divest jurisdiction in *any* context. Such an expansive reading of *Rucho* would permit the "political question" exception to swallow the rule.

Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns. *Cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) ("[T]he line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear[.]"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (stating that *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), involved the "difficult question" of determining the "weight to be given [the] state interest" in light of the "strength of the woman's [privacy] interest"); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2094, 204 L. Ed. 2d 452 (2019) (Kavanaugh, J., concurring) (noting that determining the constitutionality of a large cross's presence on public land was "difficult because it represents a clash of genuine and important interests"). These issues may not have been considered within the purview of the judicial branch had the Court imported wholesale *Rucho*'s "manageable standards" analysis even in the absence of *Rucho*'s inherently political underpinnings. Beyond the outcome of the instant case, I fear that the majority's holding strikes a powerful blow to our ability to hear important cases of widespread concern.

III.

To be sure, unless there is a constitutional violation, courts should allow the democratic and political processes

to perform their functions. And while all would now readily agree that the 91 years between the Emancipation Proclamation and the decision in *Brown v. Board* was too long, determining when a court must step in to protect fundamental rights is not an exact science. In this case, my colleagues say that time is "never"; I say it is now.

Were we addressing a matter of social injustice, one might sincerely lament any delay, but take solace that "the arc of the moral universe is long, but it bends towards justice."[15] The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations.

Where is the hope in today's decision? Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?

I would hold that plaintiffs have standing to challenge the government's conduct, have articulated claims under

15. Dr. Martin Luther King, Jr., Remaining Awake Through a Great Revolution, Address at the National Cathedral, Washington, D.C. (Mar. 31, 1968). In coining this language, Dr. King was inspired by an 1853 sermon by abolitionist Theodore Parker. *See* Theodore Parker, *Of Justice and the Conscience, in* Ten Sermons of Religion 84-85 (Boston, Crosby, Nichols & Co. 1853).

the Constitution, and have presented sufficient evidence to press those claims at trial. I would therefore affirm the district court.

With respect, I dissent.

APPENDIX G

949 F.3d 1125

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-80176

D.C. No. 6:15-cv-01517-AA
District of Oregon, Eugene

KELSEY CASCADIA ROSE JULIANA; XIUHTEZCATL TONATIUH M., through his Guardian Tamara Roske-Martinez; ALEXANDER LOZNAK; JACOB LEBEL; ZEALAND B., through his Guardian Kimberly Pash-Bell; AVERY M., through her Guardian Holly McRae; SAHARA V., through her Guardian Toa Aguilar; KIRAN ISAAC OOMMEN; TIA MARIE HATTON; ISAAC V., through his Guardian Pamela Vergun; MIKO V., through her Guardian Pamela Vergun; HAZEL V., through her Guardian Margo Van Ummerson; SOPHIE K., through her Guardian Dr. James Hansen; JAIME B., through her Guardian Jamescita Peshlakai; JOURNEY Z., through his Guardian Erika Schneider; VICTORIA B., through her Guardian Daisy Calderon; NATHANIEL B., through his Guardian Sharon Baring; AJI P., through his Guardian Helaina Piper; LEVI D., through his Guardian Leigh-Ann Draheim; JAYDEN F., through her Guardian Cherri Foytlin; NICHOLAS V., through his Guardian Marie Venner; EARTH GUARDIANS, a nonprofit organization; FUTURE GENERATIONS, through their Guardian Dr. James Hansen,

Plaintiffs-Respondents,

Appendix G

v.

UNITED STATES OF AMERICA; CHRISTY GOLDFUSS, in her capacity as Director of Council on Environmental Quality; SHAUN DONOVAN, in his official capacity as Director of the Office of Management and the Budget; JOHN HOLDREN, Dr., in his official capacity as Director of the Office of Science and Technology Policy; ERNEST MONIZ, Dr., in his official capacity as Secretary of Energy; U.S. DEPARTMENT OF THE INTERIOR; SALLY JEWELL, in her official capacity as Secretary of Interior; U.S. DEPARTMENT OF TRANSPORTATION; ANTHONY FOXX, in his official capacity as Secretary of Transportation; UNITED STATES DEPARTMENT OF AGRICULTURE; THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture; UNITED STATES DEPARTMENT OF COMMERCE; PENNY PRITZKER, in her official capacity as Secretary of Commerce; UNITED STATES DEPARTMENT OF DEFENSE; ASHTON CARTER, in his official capacity as Secretary of Defense; UNITED STATES DEPARTMENT OF STATE; JOHN F. KERRY, in his official capacity as Secretary of State; GINA MCCARTHY, in her official capacity as Administrator of the EPA; OFFICE OF THE PRESIDENT OF THE UNITED STATES; U.S. ENVIRONMENTAL PROTECTION AGENCY; U.S. DEPARTMENT OF ENERGY; DONALD J. TRUMP, in his official capacity as President of the United States,

Defendants-Petitioners.

Appendix G

Filed: December 26, 2018

ORDER

BEFORE: THOMAS, Chief Judge, and BERZON and FRIEDLAND, Circuit Judges.

The district court certified this case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), finding "that each of the factors outlined in § 1292(b) have been met . . . ." Thus, the district court "exercise[d] its discretion" in certifying the case for interlocutory appeal, noting that it did "not make this decision lightly."

An interlocutory appeal under 28 U.S.C. § 1292(b) is authorized when a district court order "'involves a controlling question of law as to which there is substantial ground for difference of opinion' and where 'an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 687–88 (9th Cir. 2011) (quoting 28 U.S.C. § 1292(b)). The district court properly concluded that the issues presented by this case satisfied the standard set forth in § 1292(b) and properly exercised its discretion in certifying this case for interlocutory appeal.

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is granted. Within 14 days after the date of this order, petitioners shall perfect the appeal in

accordance with Federal Rule of Appellate Procedure 5(d). All pending motions are denied as moot.

FRIEDLAND, Circuit Judge, dissenting:

In the process of granting certification, the district court expressed that it does not actually think that the criteria for certification are satisfied. Because I read 28 U.S.C. § 1292(b) to give discretion to district judges to determine whether an immediate appeal will promote judicial efficiency—and to authorize only those interlocutory appeals that the district judge believes will do so—I think the district court's statements prevent us from permitting this appeal.

Appellate review is ordinarily available only after a district court has entered a final judgment. 28 U.S.C. § 1291. As the Supreme Court has explained, this foundational default rule serves "important purposes," including "emphasiz[ing] the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial," "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals," and "promoting efficient judicial administration." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (internal quotation marks and citations omitted). And while § 1292(b) allows departures from that rule in limited instances, certification of interlocutory appeals should be granted only in "exceptional circumstances." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

Appendix G

A district court may certify an order for interlocutory appeal under § 1292(b) only if it is "of the opinion" that (1) the "order involves a controlling question of law as to which there is substantial ground for difference of opinion," and (2) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Supreme Court indicated that it believes this case involves controlling questions as to which there are substantial grounds for difference of opinion. *United States v. U.S. District Court*, 139 S. Ct. 1 (July 30, 2018) (mem) ("The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion."); *see also United States v. U.S. District Court*, — U.S. —, 139 S. Ct. 452, 202 L.Ed.2d 344 (2018) (mem) (referencing the Court's July 30th order as "noting that the 'striking' breadth of plaintiffs' claims 'presents substantial grounds for difference of opinion'"). We referenced that assessment in our own order granting Petitioners' motion for a temporary stay to allow time for consideration of pending motions. Order, *United States v. U.S. District Court*, No. 18-73014, Dkt. 3 (9th Cir. Nov. 8, 2018).

Apparently in response, the district court certified its motion to dismiss, judgment on the pleadings, and summary judgment orders for immediate appeal. Reading the certification order as a whole, however, I do not believe that the district court was actually "of the opinion" that "an immediate appeal from [these orders] [would] materially advance the ultimate termination of the litigation"—nor did it meaningfully "so state." 28

U.S.C. § 1292(b). The district court emphasized that "[t]rial courts across the country address complex cases involving similar jurisdictional, evidentiary, and legal questions as those presented here without resorting to certifying for interlocutory appeal," and the court said that it stood "by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial." *Juliana v. United States*, No. 6:15-CV-01517-AA, 2018 WL 6303774, at *3 (D. Or. Nov. 21, 2018). But the court then suggested that, because of the Supreme Court's statements and our repetition thereof in what the court called an "extraordinary Order," it was "find[ing] that each of the factors outlined in § 1292(b) [were] met." *Id.*

Although the district court's statement that the § 1292(b) factors were met would ordinarily support certification, here it appears that the court felt compelled to make that declaration even though—as the rest of its order suggests—the court did not believe that to be true. This is very concerning, because § 1292(b) reserves for the district court the threshold determination whether its two factors are met. The statutory scheme makes particular sense with respect to the second factor, because although we and the Supreme Court may be as well-positioned as the district court to consider whether § 1292(b)'s purely legal first requirement is satisfied, the district court—having, among other things, direct experience with the parties, knowledge of the status of discovery, and the ability to sequence issues for trial—is far better positioned to assess how to resolve the litigation most efficiently. Neither we nor the Supreme Court had expressed a view

on that second requirement, but it seems the district court interpreted our orders as mandating certification anyway.[1]

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1. It is also concerning that allowing this appeal now effectively rewards the Government for its repeated efforts to bypass normal litigation procedures by seeking mandamus relief in our court and the Supreme Court. If anything has wasted judicial resources in this case, it was those efforts. *See* Petition for Writ of Mandamus to the United States District Court for the District of Oregon and Request for Stay of Proceedings in District Court, *United States v. U.S. District Court*, No. 17-71692, Dkt. 1 (9th Cir. June 9, 2017) (requesting a stay of district court proceedings and relief from the Ninth Circuit); Petition for a Writ of Mandamus and Emergency Motion for a Stay of Discovery and Trial Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-71928, Dkt. 1 (9th Cir. July 5, 2018) (same); Application for a Stay Pending Disposition by the United States Court of Appeals for the Ninth Circuit of a Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and Any Further Proceedings in This Court and Request for an Administrative Stay, *United States v. U.S. District Court*, No. 18A65 (U.S. July 17, 2018) (requesting a stay from the Supreme Court pending Ninth Circuit review of mandamus petition); Petition for a Writ of Mandamus Requesting a Stay of District Court Proceedings Pending Supreme Court Review, Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-72776, Dkt. 1 (9th Cir. Oct. 12, 2018) (requesting a stay of district court proceedings from the Ninth Circuit pending Supreme Court review of mandamus petition); Application for a Stay Pending Disposition of a Petition for a Writ of Mandamus to the United States District Court for the District of Oregon and any Further Proceedings in this Court and Request for an Administrative Stay, *In re United States, Applicants*, No. 18A410 (U.S. Oct. 18, 2018) (bypassing the Ninth Circuit and requesting mandamus relief from the Supreme Court); Petition for a Writ of Mandamus

Section 1292(b) respects the district court's superior vantage point and its particular, critical role in the judicial process by allowing an interlocutory appeal only when the district court is "of the opinion" that both of the section's requirements are met. 28 U.S.C. § 1292(b). We have accordingly held that we lack jurisdiction when a district court grants certification but simultaneously expresses that it does not think the requirements of § 1292(b) are satisfied. *See Couch v. Telescope, Inc.*, 611 F.3d 629, 632 (9th Cir. 2010). Because that is the situation we face here, I believe we should allow the case to proceed to trial.[2] We

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and Emergency Motion Under Circuit Rule 27-3, *United States v. U.S. District Court*, No. 18-73014, Dkt. 1 (9th Cir. Nov. 5, 2018) (requesting a stay of district court proceedings and relief from the Ninth Circuit).

2. In *Couch*, after explaining that interlocutory appeal was precluded by the district court's assessment of the § 1292(b) requirements, we went on to also discuss why we believed the district court was correct in that assessment. 611 F.3d at 633-34. That further discussion, which related to § 1292(b)'s first requirement, seems to have been unnecessary to our holding regarding application of § 1292(b), which turns solely on the *district judge's* opinion whether the two factors are satisfied. But, in any event, I do not think the district court's conclusion here that "this case would be better served by further factual development at trial" than by immediate appeal represents an abuse of discretion. *Juliana*, 2018 WL 6303774, at *3; *cf. United States v. W.R. Grace*, 526 F.3d 499, 509, 516 (9th Cir. 2008) (en banc) (emphasizing that "district courts have inherent power to control their dockets" and that we review pretrial case management and discovery orders for abuse of discretion); *Gen. Signal Corp. v. MCI Telecommc'ns Corp.*, 66 F.3d 1500, 1507 (9th Cir. 1995) ("This court reviews issues relating to the management of trial for an abuse of discretion.").

could then resolve any novel legal questions if and when they are presented to us after final judgment.

For these reasons, I respectfully dissent.

APPENDIX H

2018 WL 6303774

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

Filed: November 21, 2018

ORDER

AIKEN, District Judge.

This case was originally filed in August 2015. After a protracted period of discovery disputes, dispositive motions, and mandamus petitions, this case was set for trial beginning on October 29, 2018, with a pretrial conference to be held on October 23, 2018. On October 19, 2018, the

United States Supreme Court issued an administrative Order staying trial and all discovery in response to a petition for a writ of mandamus and application for stay filed with the Court by federal defendants. (doc. 399) Pursuant to that Order, this Court vacated the trial date and all related deadlines. On November 2, 2018, the Supreme Court denied federal defendants' application for stay pending disposition of their petition for a writ of mandamus without prejudice, specifically noting the impropriety of seeking review from the Supreme Court without first filing a petition with the relevant circuit court. (doc. 416)

On November 5, 2018, pursuant to the Supreme Court's Order vacating the administrative stay, this Court scheduled a status conference for November 8, 2018 at 3:30 p.m. to confer with the parties concerning the status of this litigation. (doc. 417) Over the course of these proceedings, this Court has been aware of federal defendants' concerns and their interest in pursuing an interlocutory appeal. Given the sheer volume of evidence submitted by the parties, however, this Court believed that a bifurcated trial might present the most efficient course for both the parties and the judiciary. The Court has discussed on the record dividing the trial into a liability phase and a remedy phase pursuant to Federal Rule of Civil Procedure 42(b). The Court would then be able to reserve the question of interlocutory appeal by either party until the close of the liability phase once all the evidence and testimony could be distilled into a more cohesive and accessible record. Should the liability phase of the trial have resulted in a finding for plaintiffs, for example, federal defendants would have been able to pursue an appeal of that determination before

the Court proceeded to the remedy phase of this case. The Court believed that such a course would allow reviewing courts to consider the parties' arguments on appeal with the benefit of a fully developed factual record.

Apart from the possibility of resetting the trial date at the November 8, 2018 status conference, there were several pending motions, discovery disputes, and evidentiary matters that required the Court's consideration. Given the number of attorneys and expert witnesses involved in the case and the scheduling issues inherent in the upcoming holiday season, the Court anticipated that any new beginning trial date would be set, at the earliest, in January or February of 2019.

Later on November 5, 2018, federal defendants belatedly filed a petition for a writ of mandamus with the United States Court of Appeals for the Ninth Circuit in *United States v. USDC-ORE*, Case No. 18-73014, in which they also sought an emergency stay of proceedings in this Court pending the disposition of their petition.

On November 8, 2018 at 1:25 p.m., the Ninth Circuit issued an Order in Case No. 18-73014, staying trial in this case pending that court's consideration of defendants' mandamus petition. At 3:30 p.m. that same day, the Court held its telephonic status conference, during which it notified the parties of the Ninth Circuit's order staying trial. During the status conference, the parties reported that they had met earlier that morning to confer on the pending evidentiary motions and had reached tentative resolutions on some outstanding discovery issues.

Consistent with the Ninth Circuit's Order, no new trial or pretrial conference dates were set.

In its November 8 Order, the Ninth Circuit also invited this Court to revisit its decision to deny interlocutory review. "'As long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient.'" *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (quoting *Melancon v. Texaco, Inc.*, 659 F.2d 551, 553 (5th Cir. 1981)). "[W]hen a district court issues 'an interlocutory order, the district court has plenary power over it and this power to reconsider, revise, alter or amend the interlocutory order is not subject to the limitations of Rule 59.'" *Id.* (quoting *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1315 (11th Cir. 2000)).

With respect to the question of interlocutory appeal, appellate review is generally available only after a final judgment has been entered by a district court. 28 U.S.C. § 1291. The Interlocutory Appeals Act, 28 U.S.C. § 1292(b), provides a limited exception to that requirement: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, [s]he shall so state in writing in such order." 28 U.S.C § 1292(b). "Even where the district court makes such a certification, the court of appeals nevertheless has

discretion to reject the interlocutory appeal[] and does so quite frequently." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1068 (9th Cir. 2002) (citing to 16 Wright, Miller & Cooper § 3929, at 363).

Congress did not intend district courts to certify interlocutory appeals "merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Rather such certification should be granted only "in extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation." *Id.*

Thus, interlocutory certification is certainly the exception rather than the rule in appellate review. Reserving appellate review of a district court's decisions for after trial or a final judgment serves several important purposes. Crucially, it "emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber Co. v. Risjord*, 49 U.S. 368, 374 (1981). The importance of this concept was recognized by Congress when, in drafting 28 U.S.C. § 1292, it granted district courts the sole discretion to decide in the first instance whether a case or order is appropriate for interlocutory review.[1]

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1. "The legislative history of the Act clearly shows that in passing this legislation Congress did not intend that the courts abandon the final judgment doctrine and embrace the principle of piecemeal appeals." *United States v. Woodbury*, 263 F.2d 784, 788 (9th Cir. 1959).

Appendix H

The function of trial courts in our judicial system is to initially consider the myriad evidence and legal issues offered by the parties and then refine them to their most essential form, rendering judgment and relief as the law allows. Our judicial system affords district courts the respect of operating under an assumption that such courts do not "insulate hotly contested decisions from [] review simply by fast-tracking those decisions and excluding them from its published determination." *Indep. Producers Group v. Librarian of Cong.*, 792 F.3d 132, 138 (D.C. Cir. 2015). Here, the Court has deliberately considered all motions brought by the parties, and its decisions are accessible for appellate scrutiny. (docs. 83, 172, 238, and 369) Trial courts across the country address complex cases involving similar jurisdictional, evidentiary, and legal questions as those presented here without resorting to certifying for interlocutory appeal. As Justice Stewart noted, "the proper place for the trial is in the trial court, not here." *Baker v. Carr*, 369 U.S. 186, 266 (1962) (Stewart, J., concurring.)

Importantly, the Supreme Court has recognized that "[p]ermitting piecemeal appeals would undermine the independence of the district judge[.]" *Id.* Additionally, ordinary adherence to the final judgment rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Id.* (quoting *Cobbledick v. United States*, 309 U.S. 323,

325 (1940)). The Court notes again that this three-year-old case has proceeded through discovery and dispositive motion practice with only trial remaining to be completed.

This Court stands by its prior rulings on jurisdictional and merits issues, as well as its belief that this case would be better served by further factual development at trial. The Court has, however, reviewed the record and takes particular note of the recent orders issued by the United States Supreme Court on July 30, 2018, and November 2, 2018, as well as the extraordinary Order of the United States Court of Appeals for the Ninth Circuit in *United States v. USDC-ORE*, Case No. 18-73014 issued on November 8, 2018. At this time, the Court finds sufficient cause to revisit the question of interlocutory appeal as to its previous orders, and upon reconsideration, the Court finds that each of the factors outlined in § 1292(b) have been met regarding the previously mentioned orders. Thus, this Court now exercises its discretion and immediately certifies this case for interlocutory appeal. The Court does not make this decision lightly. Accordingly, this case is STAYED pending a decision by the Ninth Circuit Court of Appeals.

IT IS SO ORDERED.

DATED this 21st day of November, 2018.

/s/ Ann Aiken
ANN AIKEN
United States District Judge

APPENDIX I

139 S. Ct. 452

SUPREME COURT OF THE UNITED STATES

No. 18A410

IN RE UNITED STATES, *et al.*,

Applicants.

Filed: November 2, 2018

OPINION

The Government seeks a stay of proceedings in the District Court pending disposition of a petition for a writ of mandamus, No. 18–505, ordering dismissal of the suit. In such circumstances, a stay is warranted if there is (1) "a fair prospect that a majority of the Court will vote to grant mandamus," and (2) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) *(per curiam)*. Mandamus may issue when "(1) 'no other adequate means [exist] to attain the relief [the party] desires,' (2) the party's 'right to issuance of the writ is clear and indisputable,' and (3) 'the writ is appropriate under the circumstances.'" *Ibid.* (quoting *Cheney v. United*

States Dist. Court for D.C., 542 U.S. 367, 380–381, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004)). "The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Id.* at 380, 124 S.Ct. 2576 (quoting *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943)).

The Government contends that these standards are satisfied here because the litigation is beyond the limits of Article III. The Government notes that the suit is based on an assortment of unprecedented legal theories, such as a substantive due process right to certain climate conditions, and an equal protection right to live in the same climate as enjoyed by prior generations. The Government further points out that plaintiffs ask the District Court to create a "national remedial plan" to stabilize the climate and "restore the Earth's energy balance."

The District Court denied the Government's dispositive motions, stating that "[t]his action is of a different order than the typical environmental case. It alleges that defendants' actions and inactions-whether or not they violate any specific statutory duty-have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty." *Juliana v. United States,* 217 F.Supp.3d 1224, 1261 (D.Ore.2016). The District Court declined to certify its orders for interlocutory review under 28 U.S.C. § 1292(b) (permitting such review when the district court certifies that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially

advance the ultimate termination of the litigation"). See this Court's order of July 30, 2018, No. 18A65 (noting that the "striking" breadth of plaintiffs' below claims "presents substantial grounds for difference of opinion").

At this time, however, the Government's petition for a writ of mandamus does not have a "fair prospect" of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit. When mandamus relief is available in the court of appeals, pursuit of that option is ordinarily required. See S.Ct. Rule 20.1 (petitioners seeking extraordinary writ must show "that adequate relief cannot be obtained in any other form *or from any other court*" (emphasis added)); S.Ct. Rule 20.3 (mandamus petition must "set out with particularity why the relief sought is not available in any other court"); see also *Ex parte Peru,* 318 U.S. 578, 585, 63 S.Ct. 793, 87 L.Ed. 1014 (1943) (mandamus petition "ordinarily must be made to the intermediate appellate court").

Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50–day trial was scheduled to begin on October 29, 2018, and is being held in abeyance only because of the current administrative stay.

In light of the foregoing, the application for stay, presented to THE CHIEF JUSTICE and by him referred to the Court, is denied without prejudice. The order heretofore entered by THE CHIEF JUSTICE is vacated.

Justice THOMAS and Justice GORSUCH would grant the application.

APPENDIX J

339 F. Supp. 3d 1062

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
EUGENE DIVISION

Case No. 6:15-cv-01517-AA

KELSEY CASCADIA ROSE JULIANA, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants.

Filed: October 15, 2018

OPINION AND ORDER

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AIKEN, Judge:[1]

In this civil rights action, plaintiffs—a group of young people who were between the ages of eight and nineteen when this lawsuit was filed; Earth Guardians, a nonprofit association of young environmental activists; and Dr. James Hansen, acting as guardian for plaintiff "future generations"—allege that the federal government is violating their rights under the Fifth Amendment to the United States Constitution.

Before the Court are two dispositive motions: federal defendants' Motion for Judgment on the Pleadings (doc. 195) and federal defendants' Motion for Summary Judgment (doc. 207). For the reasons set forth below, the Motion for Judgment on the Pleadings is granted in part and denied in part, and the Motion for Summary Judgment is granted in part and denied in part.

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1. As with the Court's previous Order and Opinion on the federal defendants' motions to dismiss, student externs worked on each stage of the preparation of this opinion. The Court would be remiss if it did not acknowledge the invaluable contributions of JoAnna Atkinson (George Washington University Law School), Trevor Byrd (Willamette University Law School), Doyle Canning (University of Oregon School of Law), Omeed Ghafarri (University of Washington School of Law), Tyler Hardman (University of Oregon School of Law), Maggie Massey (University of Oregon School of Law), and Patrick Rosand (Boston University School of Law), Elise Williard (University of Oregon School of Law).

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BACKGROUND

Plaintiffs filed this action in August 2015, naming the United States, President Barack Obama, and the heads of numerous executive agencies (collectively, "federal defendants") as defendants.[2] Plaintiffs allege that federal defendants have known for more than fifty years that carbon dioxide ("CO_2") produced by the industrial scale burning of fossil fuels was "causing global warming and dangerous climate change, and that continuing to burn fossil fuels would destabilize the climate system on which present and future generations of our nation depend for their wellbeing and survival." First Am. Compl. ¶ 1. Plaintiffs further allege that federal defendants have long "known of the unusually dangerous risks of harm to human life, liberty, and property that would be caused by continued fossil fuel burning." *Id.* ¶ 5. Plaintiffs assert that, rather than responding to this knowledge by "implement[ing] a rational course of effective action to phase out carbon pollution," federal defendants "have continued to permit, authorize, and subsidize fossil fuel extraction, development, consumption and exportation[,]" thereby "deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history[.]" *Id.* ¶¶ 5, 7.

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2. The First Amended Complaint names as defendants the United States, the President, and the heads of the Council on Environmental Quality, the Office of Management and Budget, the Office of Science and Technology Policy, the Department of Energy, the Department of the Interior, the Department of Transportation, the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of State, and the Environmental Protection Agency.

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Plaintiffs contend that federal defendants' policy on fossil fuels deprives plaintiffs of life, liberty, and property without due process of law; impermissibly discriminates against "young citizens, who will disproportionately experience the destabilized climate system in our country[;]" and fails to live up to federal defendants' obligations to hold certain essential natural resources in trust for the benefit of all citizens. *Id.* ¶ 8. Plaintiffs seek injunctive and declaratory relief, asserting that there is "an extremely limited amount of time to preserve a habitable climate system for our country" before "the warming of our nation will become locked in or rendered increasingly severe." *Id.* ¶ 10.

In November 2015, federal defendants moved to dismiss for failure to state a claim under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (doc. 27) Federal defendants argued that plaintiffs lacked standing to sue; that plaintiffs' public trust claims failed as a matter of law because the public trust doctrine does not apply to the federal government; that plaintiffs' equal protection claims could not proceed because plaintiffs are not members of a protected class and the government's energy and climate policies have a rational basis; and that plaintiffs' due process claims were deficient because they had not alleged violation of a fundamental right.

Also in November 2015, three national trade organizations—the National Association of Manufacturers, American Petroleum Institute, and American Fuel & Petrochemical Manufacturers (collectively, "intervenor-defendants")—moved to intervene under Federal Rule

of Civil Procedure 24(a) and dismiss the complaint. (doc. 14 & 19) Like federal defendants, intervenor-defendants argued that plaintiffs lacked standing to sue. Intervenor defendants also argued that plaintiffs had failed to identify a cognizable cause of action and that dismissal was required because the case presented non justiciable political questions.

In January 2016, Magistrate Judge Coffin granted intervenor-defendants' motion to intervene. *Juliana v. United States*, 2016 WL 138903, at *5 (D. Or. Jan. 14, 2016). In April 2016, following oral argument, Judge Coffin issued his Findings and Recommendation ("F&R"), recommending that the Court deny both motions to dismiss. (doc. 68) Federal defendants and intervenor-defendants filed objections to the F&R and the Court held oral argument in September 2016. (doc. 73, 74 & 81) Following that argument, in November 2016, the Court issued an opinion and order adopting Judge Coffin's F&R and denying the motions to dismiss. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1276 (D. Or. 2016).

In January 2017, federal defendants filed their Answer. (doc. 98) They agreed with many of the scientific and factual allegations in the First Amended Complaint, including that:

- "for over fifty years some officials and persons employed by the federal government have been aware of a growing scientific body of research concerning the effects of fossil fuel emissions on atmospheric concentrations of CO_2 including that increased concentrations of

atmospheric CO_2 could cause measureable long-lasting changes to the global climate, resulting in an array of severe and deleterious effects to human beings, which will worsen over time;"

- "global atmospheric concentrations of CO_2, methane, and nitrous oxide are at unprecedentedly high levels compared to the past 800,000 years of historical data and pose risks to human health and welfare;"

- "Federal Defendants . . . permit, authorize, and subsidize fossil fuel extraction, development, consumption, and exportation;"

- "fossil fuel extraction, development, and consumption produce CO_2 emissions and . . . past emissions of CO_2 from such activities have increased the atmospheric concentration of CO_2;"

- "EPA has concluded . . . that, combined, emissions of six well-mixed [greenhouse gases] are the primary and best understood drivers of current and projected climate change;"

- "the consequences of climate change are already occurring and, in general, those consequences will become more severe with more fossil fuel emissions;"

- "climate change is damaging human and natural systems, increasing the risk of loss of life, and requiring adaptation on larger and faster scales than

current species have successfully achieved in the past, potentially increasing the risk of extinction or severe disruption for many species;" and

- "human activity is likely to have been the dominant cause of observed warming since the mid-1900s."

Fed. Defs.' Answer to First Am. Compl. ¶¶ 1; 5; 7; 10; 213; 217. Those admissions and federal defendants' other filings make clear that plaintiffs and federal defendants agree on the following contentions: climate change is happening, is caused in significant part by humans, specifically human induced fossil fuel combustion, and poses a "monumental" danger to Americans' health and welfare. *See Juliana*, 217 F. Supp. 3d at 1234 n.3 (quoting federal defendants' objections to Judge Coffin's F&R recommending denial of the motions to dismiss). The pleadings also make clear that plaintiffs and federal defendants agree that federal defendants' policies regarding fossil fuels and greenhouse gas emissions play a role in global climate change, though federal defendants dispute that their actions can fairly be deemed to have caused plaintiffs' alleged injuries.[3]

3. Intervenor-defendants' Answer, by contrast, contained no admissions with respect to plaintiffs' factual and scientific assertions about climate change. (doc. 93) Intervenor-defendants asserted that they lacked sufficient information to admit or deny those allegations. At a series of status conferences in 2017, Judge Coffin pressed intervenor-defendants to clarify their position regarding whether the issues to be litigated at trial would include whether climate change is happening or whether humans play a role in causing climate change. Intervenor-defendants withdrew from the lawsuit before taking a position on those questions.

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In January 2017, Barack Obama left office and Donald J. Trump assumed the presidency. In March 2017, both federal defendants and intervenor-defendants moved to certify the opinion and order denying their motion to dismiss for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). (doc. 120 & 122) That same day, federal defendants sought a stay of proceedings pending this Court's resolution of the motion to certify for interlocutory appeal and the Ninth Circuit's resolution of that proposed appeal. (doc. 121) In April 2017, Judge Coffin denied the request for a stay. (doc. 137) In May 2017, Judge Coffin issued his F&R recommending that the Court deny the motions to certify. (doc. 146) Federal defendants and intervenor-defendants filed objections, and in June 2017, the Court adopted Judge Coffin's F&R and declined to certify the opinion and order for interlocutory appeal. *Juliana v. United States*, 2017 WL 2483705, at *2 (D. Or. June 8, 2017).

In May and June 2017, intervenor-defendants moved to withdraw from this lawsuit. (docs. 163, 166 & 167) Judge Coffin granted that motion. (doc. 182)

In June 2017, federal defendants filed a petition for writ of mandamus in the Ninth Circuit, seeking an order directing this Court to dismiss the case. (doc. 177) Federal defendants asked the Ninth Circuit to stay all proceedings in this Court pending resolution of that petition. *Id.* In July 2017, the Ninth Circuit granted the request for a stay and ordered plaintiffs to file a response to the petition for writ of mandamus. Ninth Circuit Case No. 17-71692.

On March 7, 2018, the Ninth Circuit denied the petition for writ of mandamus. *In re United States*, 884

F.3d 830, 833 (9th Cir. 2018). The denial rested on the court's determination that federal defendants had not satisfied any of the factors justifying the extraordinary remedy of mandamus. *Id.* at 834-38.

On May 7, 2018, federal defendants filed a motion for judgment on the pleadings. (doc. 195) In that motion, they seek to dismiss President Trump as a party and to obtain dismissal of the entire lawsuit on the grounds that plaintiffs failed to state a claim under the Administrative Procedure Act ("APA"). Additionally, federal defendants argue that plaintiffs' requested relief is barred by the separation of powers. Federal defendants also moved for a protective order, seeking a stay of all discovery on the theory that discovery in this case is barred by the APA. (doc. 196) Specifically, federal defendants sought a stay of discovery pending the resolution of the motion for a protective order, the motion for judgment on the pleadings, and a not-yet-filed motion for summary judgment. On May 22, 2018, federal defendants filed a motion for summary judgment. (doc. 207) In that motion, they seek a judgment as a matter of law in their favor, arguing that (1) there are no genuine issues of material fact; (2) plaintiffs lack Article III standing to sue; (3) plaintiffs have failed to assert a valid cause of action under the APA; (4) plaintiffs' claims violate separation of powers principles; (5) plaintiffs have no due process right to a climate system capable of sustaining human life; and (6) the federal government has no obligations under the public trust doctrine.

Meanwhile, the Solicitor General was considering seeking Supreme Court review of the Ninth Circuit's opinion denying mandamus relief. The presumptive deadline to file a petition for writ of certiorari to review

that opinion was June 5, 2018. On May 24, 2018, the Solicitor General sought to extend the time for filing a petition for writ of certiorari to July 5, 2018. That request was docketed in *United States v. U.S. District Court for the District of Oregon*, Supreme Court No. 17A1304. Justice Kennedy granted the extension.

On May 25, 2018, Judge Coffin denied federal defendants' motion for a protective order and a stay. (doc. 212) On June 1, 2018, federal defendants filed objections to Judge Coffin's denial of the protective order and requested a stay of discovery pending resolution of those objections. (doc. 215 & 216) On June 14, 2018, the Court denied that request for a stay by minute order. (doc. 238)

On June 25, 2018, federal defendants sought a second extension of the deadline for filing a petition for writ of certiorari. Justice Kennedy granted that request and extended the deadline to August 4, 2018.

On June 29, 2018, the Court affirmed Judge Coffin's denial of federal defendants' request to stay all discovery. (doc. 300) On July 5, 2018, federal defendants sought review of that decision through a second petition for writ of mandamus in the Ninth Circuit. In separate filings, federal defendants asked this Court and the Ninth Circuit to stay all discovery and trial pending the Ninth Circuit's resolution of that petition. On July 16, 2018, the Ninth Circuit denied the request for a stay. On July 17, 2018, the Court denied the request for a stay. (doc. 324) That same day, the Solicitor General petitioned Justice Kennedy for a stay of proceedings pending the Ninth Circuit's resolution of the mandamus petition. That request was docketed at

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United States v. U.S. District Court for the District of Oregon, Supreme Court No. 18A65. In his application for a stay, the Solicitor General suggested to Justice Kennedy that he could construe the stay application as a petition for writ of mandamus directing this Court to dismiss the lawsuit or as a petition for a writ of certiorari to review the Ninth Circuit's first mandamus decision. On July 18, 2018, the parties appeared for oral argument before this Court on the Motion for Judgment on the Pleadings and Motion for Summary Judgment.

On July 20, 2018, the Ninth Circuit denied federal defendants' second mandamus petition, holding that federal defendants had not met the standard to qualify for mandamus relief. *In re United States*, 895 F.3d 1101, 1104-05 (9th Cir. 2018). The court concluded that because "no new circumstances justify this second petition," it "remains the case that the issues the government raises in its petition are better addressed through the ordinary course of litigation." *Id.*

That same day, the Solicitor General wrote to Justice Kennedy to reiterate his request that he construe the application for a stay in Supreme Court Case No. 18A65 as a petition for a writ of certiorari to review the Ninth Circuit's first mandamus decision. Alternatively, he suggested that Justice Kennedy could construe the application as a petition for a writ of certiorari to review the Ninth Circuit's second mandamus decision. On July 30, 2018, Justice Kennedy referred the application for a stay to the entire Supreme Court. In a summary order, the Supreme Court denied as the Solicitor General's application as premature.

This leaves two substantive motions before the Court, which the Court now addresses in Sections I and II below: federal defendants' motion for judgment on the pleadings, and federal defendants' motion for summary judgment. Defendants have also requested that the Court certify any portion of this opinion and order denying their substantive motions for interlocutory appeal, this is addressed in Section III. Plaintiffs' Motion *in Limine*, (doc. 254) seeking judicial notice of certain documents, is addressed in Section IV.

STANDARDS

A party may move for judgment on the pleadings after the pleadings are closed but early enough not to delay trial. Fed. R. Civ. P. 12(c). "Analysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1155 (9th Cir. 2015) (citation and quotation marks omitted). Accordingly, "[a] judgment on the pleadings is properly granted when, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) (quotation marks omitted). To survive a motion for judgment on the pleadings, "the non-conclusory 'factual content' [of the complaint]," and reasonable inferences from that content, "must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129

S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Id.; Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324. Summary judgment is inappropriate if a rational trier of fact, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor. *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008). Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. *Celotex*, 477 U.S. at 339. Finally, even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

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DISCUSSION

There are two motions before the Court in this now three year old case: federal defendants' Motion for Judgment on the Pleadings (doc. 195) and Motion for Summary Judgment (doc. 207). Many of the issues raised in these motions are interrelated. Given the nature of the arguments presented, it is more efficient and likely to avoid confusion to deal with all of the pending issues in a single opinion and order. Thus, the Court addresses each motion in turn.

I. *Motion for Judgment on the Pleadings*[4]

Federal defendants' motion for judgment on the pleadings rests on four grounds, two of which they raise

4. Even though federal defendants could have raised each argument in its 12(c) motion in its initial motion to dismiss, that failure is not a bar to asserting the arguments now. *See* Fed. R. Civ. P. 12(g) (prohibiting subsequent Rule 12 motions "based on [a] defense or objection . . . omitted" in a prior Rule 12 motion "except . . . as provided in subdivision (h)(2)"); Fed. R. Civ. P. 12(h)(2) ("A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits."). There are reasons to question the wisdom of permitting failure-to-state-a-claim defenses to be raised on different legal theories in back-to-back 12(b)(6) and 12(c) motions. *See Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 311 F. Supp. 2d 898, 905 (S.D. Cal. 2004) ("It is a waste of judicial resources to consider motion after motion in which defendants raise the same defense over and over, each time testing a new argument. Allowing such a tactic means that defendants potentially could stall litigation indefinitely as long as they can conjure up a new argument on which to base a failure to state a claim defense."). But as presently written, the rules plainly permit such successive motions.

for the first time in their 12(c) motion and two of which the Court has already considered and ruled upon. First, federal defendants move to dismiss President Trump as a defendant, arguing that he is not essential to effective relief and his presence in the lawsuit violates the separation of powers. Second, federal defendants seek dismissal of the lawsuit in its entirety, on the theory that the APA governs all challenges to federal agency action and plaintiffs have failed to state a claim under the APA. Third, federal defendants invite the Court to reconsider all aspects of its opinion and order denying their November 2016 motion to dismiss and urge dismissal of the lawsuit on the grounds raised in that motion. Finally, echoing arguments raised two years ago by intervenor-defendants, federal defendants contend that dismissal of this action is required because the Court cannot redress plaintiffs' injuries without violating the separation of powers.

A. *Motion to Dismiss President Trump as a Defendant*

Federal defendants first move to dismiss President Trump as a defendant. The Ninth Circuit declined to address federal defendants' argument on that point in its denial of the 2017 mandamus petition because defendants had not first raised the issue in this Court. *See In re United States*, 884 F.3d at 836 ("First, to the extent the defendants argue that the President himself has been named as a party unnecessarily and that defending this litigation would unreasonably burden him, this argument is premature because the defendants never moved in the district court to dismiss the President as a party.").

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At oral argument, the parties reported that plaintiffs were willing to stipulate to the dismissal of the President without prejudice. Federal defendants rejected that offer and request dismissal with prejudice. In the absence of a stipulation, the Court must address both whether dismissal is warranted and, if it is, whether that dismissal should be with or without prejudice.

Federal defendants assert that it would violate separation of powers principles for this Court to issue an injunction or declaration against President Trump in connection with his official duties. The extent to which a federal court may issue equitable relief against a sitting President is unsettled and hotly contested. As Justice O'Connor, writing for a plurality of the Court, explained twenty-five years ago:

> While injunctive relief against executive officials like the Secretary of Commerce is within the courts' power, *see Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952),] the District Court's grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows. We have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely "ministerial" duty, *Mississippi v. Johnson*, 4 Wall. 475, 498-499, 18 L. Ed. 437 (1867), and we have held that the President may be subject to a subpoena to provide information

> relevant to an ongoing criminal prosecution, *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), but in general "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi v. Johnson*, [4 Wall. at 501]. At the threshold, the District Court should have evaluated whether injunctive relief against the President was available, and, if not, whether appellees' injuries were nonetheless redressable.

Franklin v. Massachusetts, 505 U.S. 788, 802-03, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (plurality op.) (parallel citations omitted). Justice O'Connor ultimately concluded that it was unnecessary to "decide whether injunctive relief against the President was appropriate" because "the injury alleged [wa]s likely to be redressed by declaratory relief against the Secretary [of Commerce] alone." *Id.* at 803.

Since *Franklin*, subsequent cases have made clear that there is no absolute bar on issuance of declaratory and injunctive relief against a sitting president, even with regard to the exercise of his official duties. For example, in *Clinton v. City of New York*, 524 U.S. 417, 449, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998), the Supreme Court affirmed a declaratory judgment holding that certain actions taken by President Clinton under the Line Item Veto Act violated the Constitution's allocation of lawmaking authority between Congress and the President.

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In its recent decision on President Trump's second "travel ban" executive order, the Ninth Circuit cited *Franklin* for the proposition that when adequate equitable relief is likely available from some inferior governmental official (or group of officials) the President ought to be dismissed out of respect for separation of powers:

> Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the Government is well taken. Generally, we lack "jurisdiction of a bill to enjoin the President in the performance of his official duties." *Franklin v. Massachusetts*, 505 U.S. 788, 802-03, 112 S. Ct. 2767, 120 L. Ed. 2d 636 (1992) (quoting *Mississippi v. Johnson,* 71 U.S. (4 Wall.) 475, 501, 18 L. Ed. 437 (1866)); *see id.* at 802 ("[I]njunctive relief against the President himself is extraordinary, and should . . . raise [] judicial eyebrows."). Injunctive relief, however, may run against executive officials, including the Secretary of Homeland Security and the Secretary of State. *See*, *e.g.*, *Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89 (holding that President Truman did not act within his constitutional power in seizing steel mills and affirming the district court's decision enjoining the Secretary of Commerce from carrying out the order); *Franklin*, 505 U.S. at 802-03.
>
> We conclude that Plaintiffs' injuries can be redressed fully by injunctive relief against

> the remaining Defendants, and that the extraordinary remedy of enjoining the President is not appropriate here. *See Franklin*, 505 U.S. at 803. We therefore vacate the district court's injunction to the extent the order runs against the President, but affirm to the extent that it runs against the remaining "Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them."

Hawaii v. Trump, 859 F.3d 741, 788 (9th Cir. 2017), *vacated and remanded on mootness grounds*, 138 S. Ct. 377, 199 L. Ed. 2d 275 (2017). *Hawaii* makes *Franklin's* plurality opinion on this point binding Ninth Circuit precedent. The inquiry is not into the President's action or inaction in relationship to the injuries complained of, but rather into the relief requested, and whether or not equitable remedies involving the President himself are essential to that relief. As adopted in *Hawaii, Franklin*'s rule on when the President is an appropriate defendant is best understood as a strain of the canon of constitutional avoidance: because granting equitable relief against the President of the United States raises serious constitutional questions, dismissal of the President as a defendant is appropriate whenever it appears likely that the plaintiffs' injuries can be redressed through relief against another defendant.

Plaintiffs' opposition to dismissing President Trump boils down to a general assertion that complete relief may be unavailable without the President as a defendant. They

argue that further development of the factual record is necessary to determine whether injunctive or declaratory relief is available against President Trump and whether plaintiffs' injuries are redressable in the absence of such relief. The Court is not persuaded. This lawsuit is, at its heart, a challenge to the environmental and energy policies of the federal government as expressed through the action (or inaction) of federal agencies. Because the Supreme Court and Ninth Circuit have spoken so clearly about the separation of powers concerns inherent in awarding equitable relief against a sitting president, the burden is on plaintiffs to explain with specificity why relief against President Trump is essential to redressing their injuries. They have failed to carry that burden.

In an attempt to demonstrate why President Trump is necessary to effective equitable relief, plaintiffs cite a number of specific presidential actions in their Amended Complaint and briefs. For example, plaintiffs cite:

- An Executive Order in which President Trump directed a rollback of the Clean Power Plan by rescinding the moratorium on coal mining on federal lands and six other Obama-era executive orders aimed at curbing climate change and regulating emissions;

- An Executive Order in which President Trump ordered the expedition of environmental reviews and approvals for infrastructure projects;

- An Executive Order in which President Trump ordered a review of the "Waters of the United States" Rule; and

- Presidential memoranda encouraging approval of the Dakota Access Pipeline and the Keystone XL Pipeline.

The problem with those examples is that it is not enough, under *Hawaii*, to show that the President was involved in the challenged action; plaintiffs must show that effective relief is *unavailable* unless it is awarded against the President. Like the "travel ban" challenged in *Hawaii*, each of the foregoing orders and memoranda included express directives to be carried out by other governmental officials. *See*, *e.g.* Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017) (issuing orders to "[t]he heads of agencies" including to the "Administrator of the Environmental Protection Agency" and the "Secretary of the Interior"); Exec. Order No. 13766, 82 Fed. Reg. 8657 (directing the Chairman of the White House Council on Environmental Quality the Director of the Office of Management and Budget to take certain actions); Exec. Order No. 13778, 82 Fed. Reg. 12497 (Feb. 28, 2017) (addressing "the Administrator, the Assistant Secretary, and the heads of all executive departments and agencies" including the Administrator of the Environmental Protection Agency); President Trump Takes Action to Expedite Priority Energy and Infrastructure Projects (Jan. 24, 2017), https://www.whitehouse.gov/briefings-statements/president-trump-takes-action-expedite-priority-energy-infrastructure-projects/ (summarizing memoranda addressed to "relevant Federal agencies"). Thus, with respect to the propriety of the President as a defendant, this case is indistinguishable from *Hawaii* and *Franklin:* because lower governmental officials are charged with executing the challenged presidential

policies, equitable relief against President Trump is not essential to redressability.

Plaintiffs note that *Hawaii* concerned injunctive relief only, and certainly injunctive relief implicates more serious separation of powers concerns than declaratory relief. But as articulated in *Franklin*, *any* equitable relief awarded against a sitting president with respect to his official duties raises constitutional concerns. Accordingly, when effective relief is available against lower administration officials, the Court concludes that dismissal of the President is the correct decision for either type of equitable relief. *See Franklin*, 505 U.S. at 827-828 (Stevens, J., concurring) (arguing that declaratory relief against the president, like injunctive relief, "would produce needless head-on confrontations between district judges and the Chief Executive"). On the current record, the Court concludes that President Trump is not essential to effective relief because "[p]laintiffs' injuries can be redressed fully by injunctive [or declaratory] relief against the remaining [d]efendants." *Hawaii*, 859 F.3d at 788. Due respect for separation of powers therefore requires dismissal of President Trump as a defendant.

The next question is whether dismissal should be with or without prejudice. Across a host of contexts, the default rule is dismissal without prejudice. *See*, *e.g.*, *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (stating that dismissal under Federal Rule of Civil Procedure 12(b)(6) should be with prejudice only if the court determines that the pleading "could not possibly be cured by the allegation of other facts"); *Hamilton Copper & Steel Corp. v. Primary*

Steel, Inc., 898 F.2d 1428, 1429 (9th Cir. 1990) (explaining that, even when a party's misconduct justifies the sanction of dismissal, dismissal with prejudice is "extreme" and rarely deployed); Fed. R. Civ. P. 41(a)(2) (providing that dismissal at the plaintiff's request shall be without prejudice unless the dismissal order states otherwise); *In re Fresenius Granuflo/Naturalyte Dialysate Prods. Liability Litig.*, 111 F. Supp. 3d 103, 106 (D. Mass. 2015) (explaining that dismissal with prejudice under Rule 41(a)(2) generally is justified only in situations where it is clear that there is "no way for any plaintiff to bring the same claim" in the future, for example when the applicable statute of limitations has "conclusively run"); *Lepesh v. Barr*, 2001 WL 34041885, *3 (D. Or. 2001) (citing Ninth Circuit precedent governing when amendment of a pleading would be futile for the proposition that dismissal should be with prejudice only if it "appear[s] to a certainty that Plaintiff would not be entitled to relief under any set of facts that could be proven").

Federal defendants argue that President Trump should be dismissed with prejudice because Supreme Court and Ninth Circuit precedent is clear that federal courts lack jurisdiction to issue equitable relief in connection with a sitting president's performance of his official duties. As explained above, however, neither the Supreme Court nor the Ninth Circuit has gone so far. Indeed, it is clear that under some limited circumstances and when required by the constitution, such equitable relief is available. *Clinton*, for example, involved a challenge to President Clinton's use of the line-item veto. *Clinton*, 524 U.S. at 449. The veto power is, of course, exercised directly by the President

and not by subordinate agencies, so no other federal official would have been an appropriate defendant in that case. More recently, in a case involving alleged violations of the Foreign and Domestic Emoluments Clauses of the Constitution, the U.S. District Court for the District of Maryland addressed the availability of equitable relief against President Trump:

> The Court also disagrees that the President's status as the sole defendant changes this analysis, given that no official other than he could be sued to enforce the purported violations at issue. "[I]t would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he and/or the Congress has delegated the performance of duties to federal officials subordinate to the President and one or more of them can be named as a defendant." *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974).

District of Columbia v. Trump, 291 F. Supp. 3d 725, 751-52 (D. Md. 2018). The Emoluments Clauses, like the veto power, are specific to the President. A lawsuit asserting violation of those clauses therefore could not be directed to federal agency heads or other federal officials.

As explained above, on the current record, it appears that this is a case in which effective relief is available

through a lawsuit addressed only to lower federal officials. It is not possible to know how developments to the record in the course of the litigation may change the analysis. The Court cannot conclude with certainty that President Trump will never become essential to affording complete relief. For that reason, the Court concludes that dismissal without prejudice is the appropriate course. Any harm the President will suffer from the continuing *hypothetical possibility* that he might be joined as a defendant in the future is minimal. Moreover, that minimal harm is further mitigated by the fact that federal defendants would be free to oppose any future motion for leave to amend the complaint and add the President as a defendant on the grounds that permitting such amendment would cause "undue prejudice to the opposing party." *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962).

Federal defendants' motion to dismiss President Trump from this lawsuit is granted. The dismissal is without prejudice.

B. *Motion to Dismiss for Failure to State a Claim under the APA*

Federal defendants next argue that this entire case must be dismissed because plaintiffs are challenging the actions (and inactions) of federal agencies, and thus must bring their suit, if at all, under the APA.[5] The APA

5. As a threshold matter, plaintiffs contend that this Court already has rejected federal defendants' APA argument, and that the Ninth Circuit affirmed that rejection under the "no clear error' standard. Neither contention is correct. First, this Court

provides a right of judicial review to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review." *Id.* § 704. A reviewing court has authority both to "compel agency action unlawfully

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has not addressed federal defendants' APA argument. Federal defendants argued in their motion to dismiss that plaintiffs had failed to identify a viable cause of action, but they did not argue that the APA was the exclusive vehicle for claims that a federal agency has violated a plaintiff 's constitutional rights. Second, the Ninth Circuit did not "affirm" any of this Court's determinations under the "clear error" standard. It is true that in both mandamus opinions, the Ninth Circuit held that the government had not shown that this Court's order was "clearly erroneous as a matter of law," as required to satisfy the third factor of the five-factor test for mandamus relief. *In re United States*, 884 F.3d at 837-38; *see also In re United States*, 895 F.3d at 1106 ("As detailed in our opinion denying the first mandamus petition, the government does not satisfy the third, fourth, or fifth *Bauman* factors."). But in finding that the third factor had not been satisfied, the Ninth Circuit declined to take a position on whether this Court's rulings were clearly erroneous. *See In re United States*, 884 F.3d at 837 ("[W]e decline to exercise our discretion to intervene at this stage of the litigation to review preliminary legal decisions made by the district court or otherwise opine on the merits."). Because this is the first time either this Court or the Ninth Circuit has addressed federal defendants' APA argument, the Court will address the argument on its merits. *See Sprint Telephony*, 311 F. Supp. 2d at 905 (holding that application of the law of the case doctrine was inappropriate because, "although the court previously considered defendants' failure to state a claim *defense* in its earlier order, the court has not considered the *issues* defendants now raise in their motion presently before the court").

withheld or unreasonably delayed" and to "set aside agency action" on several grounds, including that the action is "arbitrary, capricious, [or] an abuse of discretion;" is "contrary to constitutional right, power, privilege, or immunity"; or exceeds the agency's statutory authority. *Id.* § 706(1) & (2)(A)–(C). The APA's judicial review provisions apply only in limited circumstances such as when agency action is final or "otherwise reviewable by statute." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1171 (9th Cir. 2017).

When a plaintiff asserts an APA claim, the court must determine whether the plaintiff has identified a final agency action subject to judicial review. *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). But here, plaintiffs have not asserted APA claims; their claims are brought directly under the United States Constitution, which has no "final agency action" requirement. As a general rule, plaintiffs are "master[s] of [their] complaint" and may choose which claims to assert and which legal theories to press. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Federal defendants' APA argument succeeds only if they can demonstrate that the APA is the only available avenue to judicial review of the government's conduct that plaintiffs challenge in this lawsuit.

Federal defendants' argument that the APA is the exclusive means to challenge *any* agency action rests on the proposition that "[w]here Congress has created a remedial scheme for the enforcement of a particular federal right,"

courts "have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). Federal defendants indiscriminately cite cases involving both claims for damages and claims for equitable relief in arguing that the APA is a comprehensive statutory scheme demonstrating Congressional intent to cut off common law claims. But in order to properly analyze federal defendants' argument, it is critical to avoid conflating the Supreme Court's treatment of claims for damages with its treatment of claims for equitable relief.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), the Supreme Court broke new ground by permitting a suit for damages against federal officials for violations of the Fourth Amendment, even though no federal statute created such a cause of action. The Court subsequently extended *Bivens* to two other contexts. In *Davis v. Passman*, 442 U.S. 228, 247, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979), the Court recognized an implied right of action to sue for damages based on an allegation that a U.S. Congressman had discriminated against an employee on the basis of sex, in violation of the Due Process Clause of the Fifth Amendment. And in *Carlson v. Green*, 446 U.S. 14, 20, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980), the Court recognized a *Bivens* cause of action for a federal prisoner alleging violations of his rights under the Eighth Amendment.

"Since *Carlson*, however, the Supreme Court has consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Western Radio Servs. Co. v. U.S. Forest Serv.*, 578 F.3d 1116, 1119 (9th Cir. 2009); *see also*, *Armstrong v. Exceptional Child Ctr., Inc.*, __U.S.__, 135 S. Ct. 1378, 1384, 191 L. Ed. 2d 471 (2015) (rejecting the argument that the Supremacy Clause creates an implied cause of action for every violation of federal law). As the Ninth Circuit has explained, whether to recognize a *Bivens* cause of action in a new context involves a two-step inquiry:

> First, the Court determines whether there is any alternative, existing process for protecting the plaintiff's interests. Such an alternative remedy would raise the inference that Congress expected the Judiciary to stay its *Bivens* hand and refrain from providing a new and freestanding remedy in damages. The Court has explained that, when the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies. . . .
>
> . . . .
>
> Second, if the Court cannot infer that Congress intended a statutory remedial scheme to take the place of a judge-made remedy, the Court

> next asks whether there nevertheless are factors counseling hesitation before devising such an implied right of action. Even where Congress has given plaintiffs no damages remedy for a constitutional violation, the Court has declined to create a right of action under *Bivens* when doing so would be plainly inconsistent with Congress' authority in this field.

Id. at 1120-21 (citations and internal quotation marks omitted).

Applying that two-step inquiry in *Western Radio*, the Ninth Circuit determined that the APA is the sort of "comprehensive remedial scheme" that indicates "Congress's intent that courts should not devise additional, judicially crafted default remedies." *Id.* at 1123. Based on that determination, the court held "that the APA leaves no room for *Bivens* claims based on agency action or inaction." *Id.* Federal defendants cite *Western Radio* for its broad language on the comprehensiveness of the APA. However, Ninth Circuit and Supreme Court precedent make clear that the analysis for *Bivens* claims is specific to the availability of remedies *for damages*.

The process for determining whether Congress intended to cut off common law claims *for equitable relief*—such as those contained in plaintiffs' petition—is substantially different. With respect to equitable relief, the Supreme Court has expressly required a "heightened" showing of clear legislative intent to displace constitutional

claims in part to avoid the "serious constitutional question" that would arise "if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988). In *Webster*, the Supreme Court expressly rejected the argument that the APA provided the only available route to judicial review of agency action and inaction. *Id.* That rejection is brought into sharp relief by Justice Scalia's assertion, in dissent, that "at least with respect to all entities that come within the [APA]'s definition of 'agency,' if review is not available under the APA it is not available at all." *Id.* at 607 n.* (Scalia, J., dissenting).

The APA contains no express language suggesting that Congress intended it to displace constitutional claims for equitable relief. Indeed, the Ninth Circuit has held that § 702 of the APA "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable"—whether such actions are asserted under the APA or under the general federal question jurisdiction statute. *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 & n.9 (9th Cir. 1989). Recognition of causes of action against federal agencies that fall outside the APA is implicit in *Presbyterian Church*; it makes little sense to hold that the APA waives sovereign immunity for both APA and non-APA claims against federal agencies if the only viable claims are subject to the APA's judicial review provisions.

Appendix J

In a recent case involving a challenge to "the confinement conditions imposed on illegal aliens pursuant to a high-level executive policy," the Supreme Court underscored the difference between claims for damages and claims for equitable relief:

> It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which it is damages or nothing. Unlike the plaintiffs in those cases, respondents do not challenge individual instances of discrimination or law enforcement overreach, which due to their very nature are difficult to address except by way of damages actions after the fact. Respondents instead challenge large-scale policy decisions concerning the conditions of confinement imposed on hundreds of prisoners. *To address those kinds of decisions, detainees may seek injunctive relief.*

Ziglar v. Abbasi, __U.S.__137 S. Ct. 1843, 1862, 198 L. Ed. 2d 290 (2017) (citations and internal quotation marks omitted) (emphasis added). The Court expressly noted that separation-of-powers concerns "are . . . more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable belief" because "the risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions[.]" *Id.* at 1861.

Supreme Court, Ninth Circuit, and other cases plainly show that challenge to federal agency action may, depending on the circumstances, be stated as an APA claim or a constitutional claim. *See*, *e.g.*, *Franklin*, 505 U.S. at 801 ("Although the apportionment challenge is not subject to review under the standards of the APA, that does not dispose of appellees' constitutional claims."); *Webster*, 486 U.S. at 603 (holding that § 102(c) of the National Security Act rendered the CIA director's personnel decisions unreviewable under the APA, but rejecting that argument that the same statute precluded a claim that those decisions violated the Constitution); *Navajo Nation*, 876 F.3d at 1170 ("Claims not grounded in the APA, like . . . constitutional claims . . . , do not depend on the cause of action found in the first sentence of § 702 [of the APA] and thus § 704's limitation does not apply to them.") (internal quotation marks omitted and alterations normalized); *Stone v. Trump*, 280 F. Supp. 3d 747, 772 (D. Md. 2017) (dismissing the plaintiffs' APA claim but permitting equal protection and due process claims to proceed in a case challenging the ban on transgender individuals serving in the military); *L. v. U.S. Immigration & Customs Enforcement*, 302 F. Supp. 3d 1149, 1168 (S.D. Cal. 2018) (dismissing the plaintiffs' APA claim but permitting their due process claim to proceed in a case challenging the federal practice of separating migrant children from their parents at the border).

Plaintiffs' claims simply do not fall within the scope of the APA. As federal defendants correctly point out, the Supreme Court has made clear that review under the APA requires a "case-by-case approach" to determine whether

"a specific final agency action has an actual or immediately threatened effect." *Lujan*, 497 U.S. at 892. By its terms, the APA contains no provisions by which plaintiffs may "seek *wholesale* improvement of [an agency] program by court decree[.]" *Id.* at 891 (emphasis in original). But that case law does not support the conclusion that plaintiffs' claims must be dismissed; it simply underscores that plaintiffs' claims are not APA claims. Plaintiffs do not contend that any single agency action is causing their asserted injuries—nor could they, given the complex chain of causation involved in climate change. They seek review of *aggregate action* by *multiple agencies*, something the APA's judicial review provisions do not address. The APA does not govern plaintiffs' claims. As a result, plaintiffs' failure to state a claim under the APA is not a ground for dismissal of this action.

C. *Motion to Dismiss on Separation of Powers Grounds & Request to Reconsider the November 2016 Denial of the Government's 12(b)(6) Motion*

Finally, federal defendants raise a set of arguments on which this Court already has ruled. First, federal defendants open their Rule 12(c) motion by asserting "that [they are] entitled to judgment as a matter of law for the reasons set forth in [their] November 2015 motion to dismiss." Defs.' Mot. for J. on the Pleadings 6. Federal defendants ask the Court to "revisit its order denying the motion to dismiss and grant judgment to Defendants on some or all of Plaintiffs' claims." *Id.* at 7. Second and more specifically, federal defendants argue that any claim brought outside the APA's framework is foreclosed by the separation of powers.

Appendix J

As an initial matter, the Court acknowledges now, as it did in 2016, that the allocation of power among the branches of government is a critical consideration in this case and reiterate that, "[s]hould plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy." *Juliana*, 217 F. Supp. 3d at 1241. The Court recognizes that there are limits to the power of the judicial branch, as demonstrated by the Court's determination that President Trump is not a proper defendant in this case.

This is the first time that federal defendants have highlighted separation of powers concerns; they did not raise that argument, except in passing, in their 12(b)(6) motion. But former defendant-intervenors raised and fully briefed separation-of-powers arguments in the section of their motion to dismiss addressing the political question doctrine. Although this is the first time federal defendants are raising a political question challenge, their brief on the subject largely reiterates arguments considered and rejected in the opinion and order on the motion to dismiss. And obviously, the invitation to reconsider the November 2016 order and opinion necessarily implicates issues on which this Court has already ruled.

In order to determine how to address federal defendants' attempt to re-raise these issues, the Court begins by considering the application of the law of the case doctrine. Under that doctrine, "a court is ordinarily precluded from reexamining an issue previously decided by the same court." *Old Person v. Brown*, 312 F.3d 1036,

1039 (9th Cir. 2002). The doctrine is "founded upon the sound public policy that litigation must come to end." *Jeffries v. Wood*, 114 F.3d 1484, 1489 (9th Cir. 1997) (en banc). It also "serves to maintain consistency." *Id.* The doctrine has three exceptions: reconsideration is permitted when "(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial." *Old Person*, 312 F.3d at 1039. Although the federal rules permit back-to-back motions to dismiss for failure to state a claim, *see* Section I n.3, *supra*, courts are under no obligation to give full consideration to a rehash of arguments already presented in a 12(b)(6) motion. *See Alexander v. City of Greensboro*, 801 F. Supp. 2d 429, 434 (M.D.N.C. 2011) (declining to "reconsider issues that it addressed fully at the Rule 12(b)(6) stage" in adjudicating a Rule 12(c) motion).

To the extent that federal defendants seek reconsideration on questions unrelated to the Court's subject matter jurisdiction, the Court declines to revisit its earlier rulings. The Court gave full and fair consideration to the arguments federal defendants now raise in their November 2016 opinion. Nothing has changed to warrant expending judicial resources in retreading that ground at this juncture. The same legal standard applies to motions under Rules 12(b)(6) and 12(c) and federal defendants have cited no intervening changes in the law.

To the extent that federal defendants' arguments challenge subject matter jurisdiction, the law of the

case doctrine does not apply. *United States v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986). But federal defendants have pointed to no relevant change in circumstances or the governing law between November 2016 and today. Accordingly, the Court has little to add to the prior opinion, which addressed the separation of powers issue at length. *See Juliana*, 217 F. Supp. 3d at 1235-42, 1270-71. The separation of powers did not require dismissal of this lawsuit in November 2016, and it does not require dismissal of this lawsuit now.

Due respect for the separation of powers has informed, and will continue to inform, the Court's approach to this case at every step of the litigation. The Court remains mindful, however, that it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L. Ed. 60 (1803). Courts have an obligation not to overstep the bounds of their jurisdiction, but they have an equally important duty to fulfill their role as a check on any unconstitutional actions of the other branches of government.

II. *Motion for Summary Judgment*[6]

Federal defendants raise several arguments in their motion for summary judgment, many of which were previously considered in the November 2016 Order. Namely, federal defendants reiterate their contention that plaintiffs lack Article III standing because their injuries are not concrete and particularized; the harms alleged by plaintiffs are not fairly traceably to federal defendants; and plaintiffs' claims are not redressable by this Court. Federal defendants also argue that plaintiffs have failed to adequately state a claim under the APA and that plaintiffs' claims would violate separation of powers principles. Federal defendants further argue, as they did in their previous motion to dismiss, that there is no fundamental right to a climate system capable of sustaining human life; that plaintiffs cannot establish a state-created danger claim; and that the public trust doctrine does not apply to the federal government.

In response, plaintiffs proffer the declarations of the named plaintiffs as well as declarations from eighteen

6. Subsequent to Oral Argument in July 2018, plaintiffs filed what they style as a Notice of Supplemental Disputed Facts Raised by federal defendants' Expert Reports in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. (doc. 338) Essentially, plaintiffs submit excerpts from defendant's expert reports and argue that these submissions show that genuine issues of material fact remain for trial. However, the Court declines to consider the notice as it is untimely and prohibited under the District's Local Rules. L.R. 7-1(f).

expert witnesses.[7] They argue that genuine issues of material fact exist as to standing, separation of powers, and their due process and public trust claims.

Many of these arguments raised in the present motion are substantially similar to those raised in federal defendants' and the former defendant-intervenors' motions to dismiss. However, federal defendants correctly note that the standard for this Court in reviewing a motion for summary judgment is different than the standard which was applied in the previous order. Thus the Court must review the briefing and record to determine whether there is any genuine dispute as to any material fact and the government is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

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7. Many of documents referenced by plaintiffs' in their response to the motion for summary judgment, and supporting declarations, are subject to their motion *in limine* (doc. 254) seeking judicial notice of certain documents. The Court has examined which of those documents are judicially noticeable in a contemporaneous opinion. Further, at oral argument plaintiffs requested that the Court take judicial notice of the announcement of the Department of Interior's plan to offer 78 million acres offshore of the Gulf Coast for oil and gas exploration and development. The Court has located the announcement of the plan available on the Department's public website. https://www.doi.gov/pressreleases/interior-announces-region-wide-oil-and-gas-lease-sale-gulf-mexico. Consistent with the Court's analysis the contemporaneous opinion regarding plaintiffs' first motion *in limine*, the Court takes judicial notice of the announcement.

Appendix J

A. *Standing*

Federal defendants argue, as they did at the pleadings stage, that plaintiffs lack Article III standing to bring their claims. While many of the arguments offered in the present summary judgment motion are substantially similar to those offered in the federal defendants' previous motion to dismiss, a different standard applies at this stage of the proceedings.

To avoid summary judgment, plaintiffs need not establish that they in fact have standing but only that there is a genuine question of material fact as to the standing elements. *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). To demonstrate standing, a plaintiff must show that (1) she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the defendant's challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). A plaintiff must support each element of the standing test "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. General factual allegations of injury resulting from the defendant's conduct will suffice in responding to a motion to dismiss. *Id.* In responding to a motion for summary judgment, however, a plaintiff can no longer rest on "'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Id.* And at the final stage

of standing evaluation, those facts (if controverted) must be supported adequately by the evidence adduced at trial. *Id.*

i. *Injury in Fact*

In an environmental case, a plaintiff cannot demonstrate injury in fact merely by alleging injury to the environment; there must be an allegation that the challenged conduct is harming (or imminently will harm) the plaintiff. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). For example, a plaintiff may meet the injury in fact requirement by alleging that the challenged activity "impairs his or her economic interests or aesthetic and environmental well-being." *Wash. Envt'l Council v. Bellon*, 732 F.3d 1131, 1140 (9th Cir. 2013) (quotation marks omitted and alterations normalized).

Plaintiffs have filed sworn declarations attesting to a broad range of personal injuries caused by human induced climate change. For example, plaintiff Jayden F. attests to being injured by extreme weather events in 2016 and 2017 which led to the flooding in both 2016 and 2017 of her home in Rayne, Louisiana. Jayden Decl. ¶ 2-16; ¶ 26; ¶ 28-32. This has caused emotional trauma, lost recreational opportunities, as well as lost personal and economic security. *Id.* at ¶ 36; 39-42. Other plaintiffs also attest to injuries caused by flooding caused by sea level rise and extreme weather events. *See* Journey Decl. ¶¶ 21-27; Levi Decl. ¶¶ 3; 12-16; Tia Decl. ¶ 9; Victoria Decl. ¶¶ 8-9. Similarly, plaintiff Journey attests that

harm to his health, personal safety, cultural practices, economic stability, food security and recreation interests have occurred due to climate destabilization and ocean acidification. Journey Decl. ¶¶ 1; 11-20;; *See also* Journey Decl. 21-27; Levi Decl. ¶¶ 3; 12-16; Tia Decl. ¶ 9; Victoria Decl. ¶¶ 8-9; Jacob Decl. ¶ 20; Wanless Decl. Ex. 1 at 30.

Plaintiff Kelsey Juliana attests that climate change has harmed her recreational interests in Oregon's freshwater lakes, rivers, forests, and mountains and has degraded the quality of local food sources and drinking water. Kelsey Decl. ¶¶ 10-12. She, like other plaintiffs, also alleges adverse health and recreation impacts caused by the increased occurrence and intensity of seasonal wildfires. *Id.* ¶ 15; Aji Decl. ¶¶ 2-3; Alexander Decl. ¶¶ 33-41; Jaime Decl. ¶ 17; Kirin Decl. ¶¶ 6-8; Xiuhtezcatl Decl. ¶ 15; Zealand Decl. ¶ 6. Some plaintiffs attest that they are suffering psychological trauma as result of fossil-fuel induced climate change caused by federal defendants. *See* Levi Decl. ¶ 5; Victoria Decl. ¶¶ 8-10, 16-18; Jayden Decl. ¶ 42; Nicholas Decl. ¶¶ 4, 7, 17. Other plaintiffs attest to injuries to their indigenous and cultural practices and values. Miko Decl. ¶¶, 6-7, Jamie Decl. ¶¶ 12-14; Xiuhtezcatl Decl. ¶¶6-8. These are merely a selection of the many injuries alleged.

Plaintiffs further offer expert testimony tying injuries alleged by plaintiffs to fossil fuel induced global warming. *See* Trenberth Decl. 23 ("[I]t is my expert opinion that Plaintiffs including Jayden, Levi, Xiuhtezcatl, Victoria, Jaime, Journey, Zealand, and Nathan are already experiencing extreme weather events that have been

exacerbated due to anthropogenic climate change."); Frumpkin Decl. Ex. 1, 2 & 11; Running Decl. 13 ("This will impact the many Plaintiffs in the West who suffer increased risk and severity of impacts from wildfires near their homes, in places that they visit for recreation, and in the air they breathe during the extended fire season, including Xiuhtezcatl, Jaime Lynn, Jacob, Sahara, Kelsey, Alex, Zealand, Nick, Aji, Nathan, Hazel and Avery."); Van Sustern Decl. Ex. 1, 17 ("The Plaintiffs I interviewed are suffering a range of emotional injuries from acute and chronic exposure to climate change—from being personally harmed by climate change impacts like drought and extreme weather events, to empathic identification with others who are harmed by climate change, to profound fears about future harm—consistent with those injuries described in the literature."); Stiglitz Decl. Ex. 1 ¶ 29 ("Youth Plaintiffs themselves will suffer the disproportionate, increased financial burdens of climate change as the impacts of climate change propagate throughout the economy.").

Federal defendants argue that these declarations fail to show that plaintiffs' injuries are concrete and particularized to them; rather federal defendants' contend that the injuries alleged are generalized widespread environmental phenomena which affect all other humans on the planet, making them nonjusticiable. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 S. Ct. 1377, 1387 n.3, 188 L. Ed. 2d 392 (2014) (explaining that generalized grievances do not meet Article III's case or controversy requirement).

However, as the Court noted in its November 2016 order:

> The government misunderstands the generalized grievance rule. As the Ninth Circuit recently explained, federal courts lack jurisdiction to hear a case when the harm at issue is "not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the common concern for obedience to the law." *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (quoting *Fed Elec. Comm'n v. Akins*, 524 U.S. 11, 23, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998)). Standing alone, "the fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel*, 673 F.3d at 909; *see also Massachusetts v. EPA*, 549 U.S. 497, 517, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) ("[I]t does not matter how many persons have been injured by the challenged action" so long as "the party bringing suit shows that the action injures him in a concrete and personal way." (quotation marks omitted and alterations normalized)); *Akins*, 524 U.S. at 24 ("[A]n injury. . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an 'injury in fact."); *Covington v. Jefferson Cnty.*, 358 F.3d 626, 651 (9th Cir. 2004) (Gould, J., concurring) ("[T]he most recent Supreme Court precedent appears to have rejected the notion that injury

> to all is injury to none for standing purposes."); *Pye v. United States*, 269 F.3d 459, 469 (4th Cir. 2001) ("So long as the plaintiff . . . has a concrete and particularized injury, it does not matter that legions of other persons have the same injury."). Indeed, even if the experience at the root of [the] complaint was shared by virtually every American," the inquiry remains whether that shared experience caused an injury that is concrete and particular to the plaintiff. *Jewel*, 673 F.3d at 910.

Juliana, 217 F. Supp.3d at 1243-44.

Further, denying "standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973). Federal defendants have presented no new controlling authority or other evidence which changes the Court's previous analysis.

As to imminence, plaintiffs must demonstrate standing for each claim they seek to press and for each form of relief sought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006). Because plaintiffs seek injunctive relief, they must show that their injuries are "ongoing or likely to recur." *Consumer Fin. Prot. Bureau v. Gordon*, 819 F.3d 1179, 1197 (9th Cir. 2016) (quoting *FTC v. Evans Prods. Co.*,

775 F.2d 1084, 1087 (9th Cir. 1985)). Plaintiffs have met this requirement under the summary judgment standard.

Plaintiffs submit evidence that fossil fuel emissions are responsible for most of the increase in atmospheric CO_2, and that increasing CO_2, in turn, is the main cause of global warming, and that atmospheric concentrations of greenhouse gasses, due to fossil fuel combustion, are increasing quickly such that planetary warming is accelerating at rates never before seen in human history. Hansen Decl. Ex. A, at 38. Further, not only are concentrations of atmospheric CO_2 continuing to increase, but the rate of increase has also nearly doubled since measurements began being recorded pushing humanity closer to the "point of no return." *Id.* at 29, 38. Estimates show that extreme weather events are likely to continue to increase as the global surface temperature continues to rise. *Id.* at 35; Trenberth Decl. Ex. 1, at 1, 8, 13. Indeed, the five hottest years in the 123 years of record-keeping in the United States have all occurred in the past decade. Trenberth Decl. Ex. 1, at 3. Plaintiffs present evidence that 2017 saw record setting events such as extreme wildfires in the western United States[8] and abnormally

8. "By 2006, scientists documented that the wildfire season in the western United States was 87 days longer than it was in the 1980s (Westerling et al. 2006). The number of large fires, >1000 acres, had grown four times, and the number of acres burned per year had increased six times. Recent studies have found the global wildfire season increased 19 [percent] globally from 1979-2013, and the global area vulnerable to wildfire increased 108 [percent] (Jolly et al. 2015)." Running Decl. Ex. 1, 13. Future wildfire activity may be 200-600 [percent] higher than today in the Pacific Northwest alone. *Id.* at 28.

strong hurricanes in the southeastern United States and Gulf of Mexico (Hurricanes Harvey, Irma, and Maria), all of which were exacerbated by climate change. *Id.* at 7-11.

Further, plaintiffs offer that global sea level rise will continue unabated under current conditions. Plaintiffs' expert Dr. James Hansen has submitted video animations showing how the future impacts of seal level rise will flood or impact the livability of the homes of plaintiffs in Louisiana, Oregon, Washington, Florida, New York, and Hawaii based on current assumptions about carbon emission. Hansen Decl. Ex. E-R. The most recent projections from the National Oceanic and Atmospheric Administration ("NOAA") provide that global mean sea level will rise between 1.5-2.5 m (5-8.2 ft.) by 2100 and that it is expected to continue to rise and even accelerate more after 2100. Wanless Decl. Ex. 1 at 12.

In sum, the Court is left with plaintiffs' sworn affidavits attesting to their specific injuries, as well as a swath of extensive expert declarations showing those injuries are linked to fossil fuel-induced climate change and if current conditions remain unchanged, these injuries are likely to continue or worsen. Federal defendants offer nothing to contradict these submissions, and merely recycle arguments from their previous motion. Thus, for the purposes of this case, the declarations submitted by plaintiffs and their experts have provided "specific facts," of immediate and concrete injuries. *Lujan*, 504 U.S. at 561; *See Bellon*, 732 F.3d at 1141.

ii. *Causation*

A plaintiff must show the injury alleged is "fairly traceable" to the challenged action of the defendant and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (citation and quotation marks omitted). Although a defendant's action need not be the sole source of injury to support standing, *Barnum Timber Co. v. EPA*, 633 F.3d 894, 901 (9th Cir. 2011), "[t]he line of causation between the defendant's action and the plaintiffs harm must be more than attenuated," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012) (citations and quotation marks omitted). However, a "causal chain does not fail simply because it has several links, provided those links are not hypothetical or tenuous and remain plausible." *Id.* (citations, quotation marks, and alterations omitted). At the summary judgment stage, the "causal connection put forward for standing purposes cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000)

Here, federal defendants argue again that the association between the conduct of which plaintiffs complain, namely the government's subsidizing the fossil fuel industry; allowing the transportation, exportation, and importation of fossil fuels; setting of energy and efficiency standards for vehicles, appliances, and buildings; reducing carbon sequestration capacity and

expanding areas for fossil fuel extraction and production through federal land leasing policies is tenuous and filled with many intervening actions by third parties. Thus, they argue that plaintiffs have failed to tether their injuries, both direct and indirect, to specific actions of the United States.

Federal defendants again rely on the Ninth Circuit's holding in *Bellon* to support their argument that "the causal chain is too weak to support standing" for plaintiffs' injuries. *Bellon*, 732 F.3d at 1142. The Court discussed *Bellon* in detail in its November 2016 Order on the motions to dismiss. *See Juliana*, 217 F. Supp. 3d at 1244-1246. Briefly, the court in *Bellon* found that the five oil refineries at issue in that case were responsible for just under six percent of total greenhouse gas emissions produced in the State of Washington. The court quoted the state's expert's declaration that the effect of those emissions on global climate change was "scientifically indiscernible, given the emission levels, the dispersal of greenhouse gases worldwide, and the absence of any meaningful nexus between Washington refinery emissions and global greenhouse gases concentrations now or as projected in the future." *Bellon*, 732 F.3d at 1144 (quotation marks omitted).

Previously, the Court distinguished *Bellon* on the procedural basis that it was considering motions to dismiss, while the court in *Bellon* reviewed an order on a motion for summary judgment. Now on summary judgment in this case, the Court still finds that *Bellon* does not foreclose standing for plaintiffs. The court in

Bellon relied on the scientific evidence, presented in an "*unchallenged declaration*" from the defendants' expert that showed that the causal connection between the regulatory actions of the defendants, the greenhouse gas emissions in question, and the injuries complained of by the plaintiffs were too tenuous to support standing. *Id.* at 1143-44 (emphasis added). The Ninth Circuit later clarified, "causation was lacking [in *Bellon*] because the defendant oil refineries were such minor contributors to greenhouse gas emissions, and the independent third-party causes of climate change were so numerous, that the contribution of the defendant oil refineries was 'scientifically indiscernible.'" *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1158 (9th Cir. 2015) (quoting *Bellon*, 732 F.3d at 1144).

Unlike in *Bellon*, plaintiffs' claims do not challenge the global impact of such specific emissions. Rather, plaintiffs have proffered uncontradicted evidence showing that the government has historically known about the dangers of greenhouse gases but has continued to take steps promoting a fossil fuel based energy system, thus increasing greenhouse gas emissions. As the Court noted in the November 2016 Order, climate science and our ability to understand the effects of climate change are constantly evolving. *Juliana*, 217 F.Supp 3d at 1245 (quoting Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 Mich. J. Envt'l & Admin. L. 1, 25 (2013) (although "climate impacts at the regional and local levels are subject, among other things, to the uncertainties of downscaling techniques[,] . . . our knowledge of the climate is developing at a breakneck

pace.")). *Bellon* does not foreclose standing in any suit simply because it is based on actions causing dangerous levels atmospheric carbon emissions.

In further contrast to *Bellon*, the pattern of federally authorized emissions challenged by plaintiffs in this case do make up a significant portion of global emissions. Federal defendants have admitted that "from 1850 to 2012, CO_2 emissions from sources within the United States including from land use "comprised more than 25 [percent] of cumulative global CO_2 emissions." Answer at ¶ 151. At oral argument, federal defendants noted that plaintiffs' evidence only shows "United States' current global contribution to current emissions is around 14 to 15 percent." July 18, 2018 Hearing Trans. 29. In a different context the Supreme Court held that United States motor-vehicle emissions which were responsible for six percent of worldwide CO_2 "make a meaningful contribution to greenhouse gas concentrations" when "judged by any standard."[9] *Mass. v. EPA*, 549 U.S. at 524-25. The emissions implicated by federal defendants' conduct in the case outstrip either of those considered in either *Bellon* or *Massachusetts*.

9. The court in *Bellon* declined to extend the rationale of *Massachusetts* in part because while the 6 percent of Washington state emissions at issue in that case might be significant in that state, the plaintiffs did not "provide any evidence that places this statistic in national or global perspective to assess whether the refineries' emissions are a meaningful contribution to global greenhouse gas levels." 732 F.3d 1131, 1146 (9th Cir. 2013) (internal citation omitted).

Still, federal defendants contend that plaintiffs do not adequately show a causal connection between a specific action taken by federal defendants and their climate change related injuries. They argue that plaintiffs' causal connection is based on the actions of third-party emitters. However, plaintiffs challenge not only the direct emissions of federal defendants through their use of fossil fuels to power its buildings and vehicles[10] but also the emissions that are caused and supported by their policies. Plaintiffs have alleged that federal defendants' systematic conduct, which includes "government policies practices, and actions, showing how each Defendant permits, licenses, leases, authorizes, and/or incentivizes the extraction, development, processing, combustion, and transportation of fossil fuel" caused plaintiffs' injuries. Plaintiffs' Resp. to Mot. for Summ J. 11. And plaintiffs provide evidence that federal defendants' actions (or inaction), such as coal leasing, oil development, fossil fuel industry subsidies, and the setting of fuel efficiency standards for vehicles, led to plaintiffs' injuries.

For example, regarding federal leasing policy, more than five million acres of National Forest lands are currently leased for oil, natural gas, coal, and phosphate development. Olsen Decl. Ex. 73. In 2016, the Department of Interior administered some 5000 active

10. These emissions are not insignificant. In 2016, the federal government had 1,340,000 cars and 1,810,000 trucks in its fleet. Olson Decl. Ex.136. In 2015, the federal fleet consumed 310,416 gallons of gasoline and 66,736 gallons of diesel. *Id.* The Department of Defense uses enough electricity to power 2.6 million average American homes. *Id.* at Ex. 217

oil and gas leases on nearly 27 million acres in the Outer Continental Shelf. *Id.* Ex. 215. In 2015, 782 million barrels of crude oil, five trillion cubic feet of natural gas, and 421 million tons of coal were produced on federal lands managed by the Department of Interior. *See Id.* Ex. 74. Between 1905 and 2016, the United States Department of Agriculture authorized the harvest of 525,484,148 billion board feet of timber from federal land, thus reducing the country's carbon sequestration capacity. *Id.* Ex. 45. Federal defendants permit livestock grazing on over 95 million acres of National Forest lands in 26 states, further reducing carbon sequestration capacity and increasing methane emissions. *Id.* 42, 46, 52, 50-55, 70. It is uncontested that federal defendants control leasing and permitting on federal land. Third parties could not extract fossil fuels or make other use of the land without Federal Defendants' permission.

Federal defendants also set energy and efficiency standards that do impact the rate at which individual and businesses emit greenhouse gases. The Department of Energy sets energy conservation standards for more than 60 categories of appliances and equipment, which covers roughly 90 percent of home energy use. *Id.* Ex. 92. Likewise, passenger cars and light trucks cannot be sold in the United States unless they comply with the Fuel Economy Standards set by the Department of Transportation, which historically have been lower in the United States than other developed nations. *Id.* Ex. 151.

Federal defendants' actions impact the import, export, and transport of fossil fuels. For example, in 2015, Congress

lifted a ban on crude oil exports and exports rose rapidly thereafter. *Id.* Ex. 96. No offshore liquefied natural gas or oil import and export facility can legally operate without a license from the Department of Transportation. *Id.* at 120 189. The Federal Energy Regulatory Commission must approve interstate transport of fossil fuel, and Department of Transportation permitting is required for transportation of hazardous material including fossil fuels. *Id.* at 384, 385. These examples are merely illustrative of the evidence proffered by plaintiffs.

Plaintiffs' expert declarations also provide evidence that federal defendants' actions have led to plaintiffs' complained of injuries. Plaintiffs' expert Dr. James Hansen asserts that "[t]he United States is, by far, the nation most responsible for the associated increase in global temperatures. The [United States] alone is responsible for a 0.15° C increase in global temperature." Hansen Decl. 28. Plaintiffs' expert Dr. Joseph Stiglitz offers that "the current national energy system, in which approximately 80 percent of energy comes from fossil fuels, is a direct result of decisions and actions taken by Defendants." Stiglitz Decl. Ex. 1 ¶ 27. That is echoed by plaintiffs' expert Dr. Mark Jacobson who notes that "fossil fuels supply more than 80 [percent] of our all-purpose energy in the United States, not out of necessity, but because of political preference and historic government support that led to the development and maintenance of a widespread fossil-fuel infrastructure." Jacobson Decl. Ex. 1, 5. Plaintiffs' expert Peter Erickson submitted that by subsidizing the low cost of oil the United States government has historically and is currently substantially

expanding the country's future oil production relative to the production that would occur if these subsidies were not in place. Erickson Decl. Ex.1, 15.

Plaintiffs' experts tether plaintiffs' specific injuries to climate change and climate change related weather events. *See generally* Section 2.A.ii. Plaintiffs' expert Dr. Harold Wanless opines that sea level rise solely caused by fossil fuel-induced climate change poses clear and irreversible harm to plaintiffs like Levi whose community will likely be uninhabitable in future. Wanless Decl. Ex. 1 at 1-2. Likewise, plaintiffs' expert Dr. Kevin Trenberth offers, as an example of climate change related weather events harming plaintiffs, localized extreme weather events like the flooding affecting plaintiff Jayden and her home were heightened by climate change. Trenberth Decl. Ex. 1 at 20-22. The magnitude of rainfall and the extent of flooding near Jayden's home would not have occurred without fossil fuel-induced climate change. *Id.* Dr. Steven Running notes that the pattern of drought that led plaintiff Jaime to move from her home on the Navajo Reservation in New Mexico is directly linked to climate change. Running Decl. 6.

At this stage of the proceedings, the Court finds that plaintiffs have provided sufficient evidence showing that causation for their claims is more than attenuated. Plaintiffs' "need not connect each molecule" of domestically emitted carbon to their specific injuries to meet the causation standard. *Bellon*, 732 F.3d at 1142-43. The ultimate issue of causation will require perhaps the most extensive evidence to determine at trial, but at this stage

of the proceedings, plaintiffs have proffered sufficient evidence to show that genuine issues of material fact remain on this issue. A final ruling on this issue will benefit from a fully developed factual record where the Court can consider and weigh evidence from both parties.

iii. *Redressability*

The final prong of the standing inquiry is redressability. The causation and redressability prongs of the standing inquiry "overlap and are two facets of a single causation requirement." *Bellon*, 732 F.3d at 1146 (citation and quotation marks omitted). They are distinct in that causation "examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested judicial relief." *Id.* A plaintiff need not show that a favorable decision is certain to redress her injury, but must show a substantial likelihood that it will do so. *Id.* For the redressability inquiry, it is sufficient to show that the requested remedy would "slow or reduce" the harm.[11] *Mass. v. EPA*, 549 U.S. at 525 (citing *Larson v. Valente*, 456 U.S. 228, 243 n.15, 102 S. Ct. 1673, 72 L. Ed. 2d 33 (1982)).

Federal defendants contend that there is no possible redress in this case because the remedies sought by

11. "[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." *Mass. v. EPA*, 549 U.S. at 525

plaintiffs are beyond the Court's authority to provide.[12] Further, they argue that even if this Court did find in favor of plaintiffs, any remedy it fashioned would not redress the harms alleged by plaintiffs, because fossil fuel emissions from other entities would still contribute to continuing global warming. Thus, they argue that there is no evidence that any immediate reduction in emissions caused by the United States would manifest in a reduction of climate change induced weather phenomena. As the Court has stated before, whether the Court could guarantee a reduction in greenhouse gas emission is the wrong inquiry because redressability does not require certainty. Rather, at this stage, it only requires a substantial likelihood that the Court could provide meaningful relief. Moreover, the possibility that some other individual or entity might later cause the same injury does not defeat standing; the question remains whether the injury caused by the defendants in this suit can be redressed. *Juliana*, 217 F. Supp. 3d at 1247; *See also WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[T]he mere existence of multiple causes of an injury does not defeat redressability, particularly for a procedural injury. So long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury.").

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12. Federal defendants rely on *Norton v. Southern Utah Wilderness Alliance* for the proposition that the Court may only compel ministerial action. 542 U.S. 55, 57-58, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). However, that case involved a claim brought under the APA. The Court has already held that these claims are not governed by the APA. *See* Sections 1.B. and 2.C.

Here, plaintiffs request declaratory and injunctive relief as well as any other relief as the Court deems just and proper. They ask the Court, *inter alia*, to "[o]rder Defendants to prepare and implement an enforceable national remedial plan to phase out fossil fuel emission and draw down excess atmospheric CO_2." First Am. Compl. ¶ 94. Plaintiffs dispute federal defendants' contention, however, that they are asking this Court to create a highly specific plan that federal defendants must use remedy any constitutional violations. Instead, plaintiffs urge that their request for relief, at its core, is one for a declaration that their constitutional rights have been violated and an order for federal defendants to develop their own plan, using existing resources, capacities, and legal authority, to bring their conduct into constitutional compliance. Plaintiffs point to various statutory authorities by which they claim federal defendants could affect the relief they request. Plaintiffs' Resp. to Mot. for Summ. J. 24-25. *See inter alia* 30 U.S.C. §§ 351-359; 33 U.S.C. § 1344; 42 U.S.C. §§ 7112; 6291-6296; 7401-7431;[13] 49 U.S.C. § 32902; 33 U.S.C. § 1344.

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13. Judge Coffin cited to § 7409 (providing the Environmental Protection Agency with the authority to regulate national ambient air quality standards for the attainment and maintenance of the public welfare) in his F&R as supporting a "strong link between all the supposedly independent and numerous third party decisions given the government's regulation of CO_2 emissions." (doc. 68 at * 10); *See also Mass. v. EPA*, 549 U.S. 497, 524, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007). (A "reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.")

Plaintiffs also offer evidence that the injuries they allege can be redressed through actions by federal defendants. *See* Hansen Decl. Ex. 1, 4 (staving off the effects of catastrophic climate change "remains possible if [the United States] phases out [greenhouse gas emissions] within several decades and actively draw[s] down excess atmospheric CO_2 [,]" which can be largely achieved "via reforestation of marginal lands with improved forestry and agricultural practices."); Robertson Decl. Ex 1 at 6 ("All told, technology is available today to store carbon or avoid future greenhouse gas emissions from agriculture in the U.S. equivalent to more than 30 [gigatonnes of carbon] by 2100); Jacobson Decl. Ex. 1 at 7 ("[I]t is technologically and economically possible to electrify fully the energy infrastructures of all 50 United States and provide that electricity with 100 [percent] clean, renewable wind, water, and sunlight (WWS) at low cost by 2030 or 2050."); Williams Decl. Ex. 1 at 3 & 64 ("[I]t is technically feasible to develop and implement a plan to achieve an 80 [percent] greenhouse gas reduction below 1990 levels by 2050 in the United States . . . with overall net [greenhouse gas] emissions of no more than 1,080 [million tons of carbon], and fossil fuel combustion emissions of no more than 750 [million tons of carbon]."); Stiglitz Decl. Ex. 1, ¶¶ 44-49 (explaining that transitioning the United States economy away from fossil fuels is feasible and beneficial).

It is clearly within a district court's authority to declare a violation of plaintiffs' constitutional rights. *See*, e.g., *Obergefell v. Hodges*, — U.S. —, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015); *Brown v. Bd. of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Lawrence v. Texas*,

539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1970). As mentioned elsewhere in this opinion, should the Court find a constitution violation, it would need to exercise great care in fashioning any form relief, even if it were primarily declaratory in nature.[14] The Court has considered the summary judgment record regarding traceability and plaintiffs' experts' opinions that reducing domestic emissions, which plaintiffs contend are controlled by federal defendants' actions, could slow or reduce the harm plaintiffs are suffering. The Court concludes, for the purposes of this motion, that plaintiffs have shown an issue of material fact that must be considered at trial on full factual record.

Regarding standing, federal defendants have offered similar legal arguments to those in their motion to dismiss. Plaintiffs, in contrast, have gone beyond the pleadings to submit sufficient evidence to show genuine issues of material facts on whether they satisfy the standing elements. The Court has considered all of the arguments and voluminous summary judgment record, and the Court finds that plaintiffs show that genuine issues of material fact exist as to each element. As the Court notes elsewhere in this opinion, the Court will revisit all of the

14. Indeed, the "remedial powers of an equity court . . . are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971).

elements of standing after the factual record has been fully developed at trial. For now, the Court simply holds that plaintiffs have met their burden to avoid summary judgment at this time.

B. *Failure to State a Claim under the APA*

Federal defendants next argue that even if the Court finds that plaintiffs have established standing, plaintiffs still have not identified a valid right of action. Essentially, federal defendants argue once again that this case must be dismissed because the APA provides the "sole mechanism" by which plaintiffs must bring their claims. Defs.' Mot. for Summ. J. 18. This issue is substantively explored in Section I.B, *infra*, and applies with equal force to this motion for summary judgment. Plaintiffs' claims are not governed by the APA. Thus, federal defendants are not entitled to summary judgment on this issue.

C. *Separation of Powers*

Federal defendants contend, once again that plaintiffs' claims and the relief sought are broader than what can be entertained as a case or controversy under Article III of the United States Constitution. The Court has already discussed similar arguments in the November 2016 Order and in Section I.C of this Opinion.

Federal defendants offer no new evidence or controlling authority on this issue that warrant reconsideration of the

Court's previous analysis.[15] Nor do they offer a rationale as to why the outcome should be different under the summary judgment standard. Indeed, they contend that the issue here is "purely legal" in nature and that "factual development" is not relevant to whether plaintiffs' requested remedy violates separation of powers issues. Defs.' Reply to Mot. for Summ. J. 26.

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15. Federal defendants point to a recent public nuisance case from the Northern District of California to support their position that this case violates separation of powers principles. *See City of Oakland v. BP P.L.C., et al.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018). There, a district court dismissed claims brought by certain cities in California against several large oil and natural gas producers. The plaintiffs alleged that the worldwide production and sale of fossil fuels by the defendants were causing climate change, the effects of which caused damage to the cities. *City of Oakland* is readily distinguishable. Here, plaintiffs allege constitutional violations against the federal government based on federal defendants' domestic carbon emissions as well as a promulgation of a domestic energy market based on fossil fuels in spite of their awareness of the dangers of such emissions. The court in *City of Oakland* focused on nuisance claims, brought for money damages, and the resulting balancing test, as well as extraterritoriality concerns stemming from the plaintiffs' attempt to impose liability on the defendants for the production and sale of fossil fuels worldwide. *Id.* at 1026. ("Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution.") Here, plaintiffs' claims are limited to the territorial boundaries of the United States. The Court is not persuaded that *City of Oakland* offers relevant guidance for the Court's consideration of this motion given the vastly different nature of the claims, requested remedies, and parties.

As the Court noted above, the allocation of powers between the branches of government is a critical consideration in this case, but it is the clear province of the judiciary to say what the law is. *Marbury*, 5 U.S. at 177. After a fuller development of the record and weighing of evidence presented at trial, should the Court find a constitutional violation, then it would exercise great care in fashioning a remedy determined by the nature and scope of that violation. Additionally, many potential outcomes and remedies remain at issue in this case. The Court could find that there is no violation of plaintiffs' rights; that plaintiffs fail to meet one or more of the requirements of standing; or, after the full development of the factual record, that the requested remedies would indeed violate the separation of powers doctrine. As has been noted before, even should plaintiffs prevail at trial, the Court, in fashioning an appropriate remedy, need not micro-manage federal agencies or make policy judgments that the Constitution leaves to other branches. The record before the Court at this stage of the proceedings, however, does not warrant summary dismissal. To grant summary judgment on these grounds at this stage—when plaintiffs have supplied ample evidence to show genuine issues of material fact—would be premature.[16]

16. Respect for separation of powers might, for example, permit the Court to grant declaratory relief, directing federal defendants to ameliorate plaintiffs' injuries without limiting its ability to specify precisely how to do so. That said, federal courts retain broad authority "to fashion practical remedies when confronted with complex and intractable constitutional violations." *Brown v. Plata*, 563 U.S. 493, 526, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011). Here the Court has not yet determined the scope, if any, of federal defendants' constitutional violations or plaintiffs' injuries.

Federal defendants also contend that merely participating in ongoing discovery and a court trial violates separation of powers principles. Federal defendants previously made this argument in their Motion for Protective Order and Stay of All Discovery. (doc. 196) This rationale was rejected by Judge Coffin in his Order denying the motion (doc. 212), which the Court later affirmed over Federal Defendant's objections. (doc. 300) Moreover, the Ninth Circuit considered this argument in federal defendant's latest petition for mandamus. The panel noted in its opinion that the government made the same argument in their first mandamus petition, and the panel "rejected" it for the purposes of the mandamus. *In re United States*, 895 F.3d at 1106 (citing *In re United States*, 884 F.3d at 836). Once again, the Court does not find federal defendants' argument persuasive and concludes that generally participating in discovery and trial here does not in and of itself violate separation of powers concerns. Federal defendants have been free to raise objections to specific discovery requests and orders which they believe implicate separation of powers concerns.

D. *Due Process Claims*

Federal defendants argue that plaintiffs' individual due process claims fail as a matter of law. The Court addresses each in turn.

i. *Fundamental Right to an Environment Capable of Sustaining Human Life*

Federal defendants argue, as they did in their previous motion to dismiss that there is no right to a climate system

capable of sustaining human life. They note that this issue is "a purely legal question" and that factual development at trial is not necessary to resolve it. Defs.' Reply to Mot. for Summ. J. 29. Federal defendants offer substantially similar arguments to those from their motion dismiss here.[17] The Court addressed these arguments in the previous order, and nothing in the current briefing persuades the Court to change its previous rationale. As stated in the November 2016 order, this Court has simply held that:

> where a complaint alleges knowing governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim

17. Federal defendants do cite a recent case from D.C. Circuit Court of Appeals arguing that it rejected the notion of a federal due process right to a stable environment. *Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 895 F.3d 102, (D.C. Cir. 2018). However, the analysis in that case involved the Environmental Rights Amendment to the Pennsylvania State Constitution, and the court ultimately held that the rights created by the amendment in question bound only "only state and local governments." *Id.* at 110. The court noted that the plaintiffs grounded their claims on the right outlined in the Pennsylvania Constitution as creating "a protected liberty or property interest as a matter of federal due process." *Id.* at 108. The court found that "the Amendment is too vague and indeterminate to create a federally cognizable property interest." *Id.* at 109. Because the court's analysis centered on the specific Pennsylvania Environmental Rights Amendment, it is not controlling here.

> for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.

Juliana, 217 F. Supp. 3d at 1250.

Reviewing the summary judgment record, plaintiffs have offered expert testimony on the catastrophic harms of climate change. *See* Section 2.A. They also submitted evidence, in the form of expert declarations and government documents, supporting their argument that the federal defendants' actions have led to these changes and are linked to the harms alleged by plaintiffs. At this stage, federal defendants have offered no legal or factual rationale significantly different from those offered in their previous motion to dismiss. As such, the Court finds no reason to re-examine the previous ruling on the existence of this due process right. Moreover, further factual development of the record will help this Court and other reviewing courts better reach a final conclusion as to plaintiffs' claims under this theory.

ii. *State-Created Danger Theory*

Federal defendants urge that plaintiffs' claims based on the state created danger doctrine must fail. First, they argue that plaintiffs do not show a special relationship between themselves and the government. More importantly, federal defendants argue that plaintiffs cannot show that government conduct proximately caused a dangerous situation in deliberate indifference to plaintiffs'

safety or that harm or loss of life has resulted from such conduct. Plaintiffs contend that they have proffered ample evidence to show genuine issues of material fact as to whether federal defendants have liability for the conduct alleged in their complaint.

With limited exceptions, the Due Process Clause does not impose an affirmative obligation on the government to act, even when "such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 196, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989). This rule is subject to two exceptions: "(1) the 'special relationship' exception; and (2) the 'danger creation' exception." *L. W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992). The "special relationship" exception provides that when the government takes an individual into custody against his or her will, it assumes some responsibility to ensure that individual's safety. *Id.* The "danger creation" exception permits a substantive due process claim when government conduct "places a person in peril in deliberate indifference to their safety[.]" *Penilla v. City of Huntington Park*, 115 F.3d 707, 709 (9th Cir. 1997).

A plaintiff challenging government inaction on a danger creation theory must first show the "state actor create[d] or expose[d] an individual to a danger which he or she would not have otherwise faced." *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006). The state action must place the plaintiff "in a worse position than that in which he would have been had the state not acted at all." *Pauluk v. Savage*, 836 F.3d 1117, 1125

(9th Cir. 2016) (quotation marks omitted and alterations normalized). Second, the plaintiff must show the "state actor . . . recognize[d]" the unreasonable risks to the plaintiff and "actually intend[ed] to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Campbell v. Wash. Dep't of Soc. & Health Servs.*, 671 F.3d 837, 846 (9th Cir. 2011) (brackets and quotation marks omitted). The defendant must have acted with "[d]eliberate indifference," which "requires a culpable mental state more than gross negligence." *Pauluk*, 836 F.3d at 1125 (quotation marks omitted).

Federal defendants' main argument is that plaintiffs' allegations regarding the government's knowledge of the dangers posed to plaintiffs by climate change do not rise to the required level of "deliberate indifference." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir. 2011) ("Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." (internal citation and quotations omitted.)). Plaintiffs' point to their expert declarations to demonstrate that federal defendants have known of, and disregarded, the consequences of continued fossil fuel use on the United States and its citizens. Federal defendants do not meaningfully refute the factual allegations, but instead deny their bearing on the issue. Therefore, there is a genuine issue of disputed facts surrounding the government's knowledge of climate change's dangers and summary judgment before trial, is inappropriate.

Plaintiffs specifically refer to the declaration from their expert Gus Speth, former chairman of the Council

on Environmental Quality under President Jimmy Carter. Mr. Speth's declaration examines a historical record spanning ten presidential administrations and references a number of documents, statements of government officials, and federal policy actions that go directly to the government's knowledge of the links between fossil fuels and increasing global mean temperature and the dangers associated therein, such as sea level rise to Americans at the time and in future.

For example, in 1969 Daniel Moynihan, then counselor to the President Richard Nixon, wrote to John Ehrlichman, President Nixon's Assistant for Domestic Affairs, summarizing the climate problem:

> The process is a simple one. Carbon dioxide in the atmosphere has the effect of a pane of glass in a greenhouse. The CO_2 content is normally in a stable cycle, but recently man has begun to introduce instability through the burning of fossil fuels. At the turn of the century several persons raised the question whether this would change the temperature of the atmosphere. Over the years the hypothesis has been refined, and more evidence has come along to support it. It is now pretty clearly agreed that the CO_2 content will rise 25 [percent] by 2000. This could increase the average temperature near the earth's surface by 7 degrees Fahrenheit. *This in turn could raise the level of the sea by 10 feet. Goodbye New York. Goodbye Washington, for that matter.*

Speth Decl. ¶ 18. (citing Olsen Dec. Ex. 2) (emphasis added)

Appendix J

In 1977, President Jimmy Carter's science advisor Frank Press wrote to the President explaining:

> Fossil fuel combustion has increased at an exponential rate over the last 100 years. As a result, the atmospheric concentration of CO_2 is now 12 percent above the pre-industrial revolution level and may grow 1.5 to 2.0 times that level within 60 years. Because of the greenhouse effect of atmospheric CO_2, the increased concentration will induce a global climatic warming of anywhere from 0.5° to 5° C. . . . The urgency of the problem derives from our inability to shift rapidly to non-fossil fuel sources once the climatic effects become evident not long after the year 2000; the situation could grow out of control before alternate energy sources and other remedial actions become effective.

Id. ¶ 21 (citing Olsen Decl. Ex. 4.)

Another example of the alleged knowledge and deliberate indifference of the federal defendants cited by plaintiffs is the United Nations Framework Convention on Climate Change, which was signed by the President George H.W. Bush and ratified by the U.S. Senate in 1992. Speth Decl. ¶ 44. The preamble to the Convention provided that:

> [H]uman activities have been substantially increasing the atmospheric concentrations of

> greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind

Olson Decl. Ex. 23

Plaintiffs further contend that the dangers of global warming were well known during the administration of Presidents William Clinton and George W. Bush. In 1996, the Council on Environmental Quality reported to Congress: "[t]he average global temperature is projected to rise 2 to 6 degrees over the next century . . . the longer we wait to reduce our emissions, the more difficult the job, and the greater the risks." Olson Decl., Ex. 25, at xi. Further, a 2007 report from the House of Representatives Committee on Oversight and Government Reform alleged that the Bush Administration misled the public regarding the effects of climate change, concluding:

> The Committee's 16-month investigation reveals a systematic White House effort to censor climate scientists by controlling their access to the press and editing testimony to Congress. The White House was particularly active in stifling discussions of the link between increased hurricane intensity and global warming. The White House also sought to minimize the significance and certainty of climate change by extensively editing

> government climate change reports. Other actions taken by the White House involved editing EPA legal opinions and op-eds on climate change.

Olson Decl., Ex. 34, at ii.

In June 2009, the U.S. Global Change Research Program ("USGCRP"), government advisory council, released its Second National Climate Assessment which noted that "[c]limate change is likely to exacerbate these challenges as changes in temperature, precipitation, sea levels, and extreme weather events increasingly affect homes, communities, water supplies, land resources, transportation, urban infrastructure, and regional characteristics that people have come to value and depend on." Olson Decl. Ex. 35 at 100. Recently, in August 2017, the USGCRP Fifth National Climate Assessment found "that reversing course on climate, as expected with the passage of time, is more urgent than ever." Speth Decl. ¶ 76.

At this stage of the proceedings, plaintiffs have introduced sufficient evidence and experts' opinions to demonstrate a question of material fact as to federal defendants' knowledge, actions, and alleged deliberate indifference. Once this claim is reviewed with a full factual record, plaintiffs must still clear a very high bar to ultimately succeed.

Additionally, based on the proffered evidence and the complex issues involved in this claim, the Court exercises its discretion to "deny summary judgment in a case where

there is reason to believe that the better course would be to proceed to a full trial." *Anderson*, 477 U.S. at 256.

The Ninth Circuit has reserved summary judgment in the past to obtain a more robust record. *See Anderson v. Hodel*, 899 F.2d 766, 770 (9th Cir 1990) ("[A]ppellate courts, including the Supreme Court, have reversed summary judgments where the lower court records have not been sufficiently developed to allow the courts to make fully informed decisions on particularly difficult and far reaching issues." (internal quotation marks omitted) (alterations omitted)); *see also Eby v. Reb Realty, Inc.*, 495 F.2d 646, 649 (9th Cir. 1974) ("In certain cases summary judgment may be inapposite because the legal issue is so complex, difficult, or insufficiently highlighted that further factual elucidation is essential for its prudently considered resolution."). The Ninth Circuit has further explained that

> [C]ourts must not rush to dispose summarily of cases—especially novel, complex, or otherwise difficult cases of public importance—unless it is clear that more complete factual development could not possibly alter the outcome and that the credibility of the witnesses' statements or testimony is not at issue. Even when the expense of further proceedings is great and the moving party's case seems to the court quite likely to succeed, speculation about the facts must not take the place of investigation, proof, and direct observation.

TransWorld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 684 (9th Cir. 1990)

Undoubtedly, this claim involves complicated and novel questions about standing, historical context, and constitutional rights. To allow a summary judgment decision without cultivating the most exhaustive record possible during a trial would be a disservice to the case, which is certainly a complex case of "public importance."[18] *Id.*

E. *Public Trust Doctrine*

Federal defendants again ask this Court to reconsider the previous ruling on the applicability of the public trust doctrine to the federal government. They allege no new circumstances or any substantially new arguments for the Court to consider on summary judgment. Indeed, federal defendants repeatedly stresses that "[n]o discovery or expert opinion is necessary" for this Court to decide "the purely legal question of whether the public trust doctrine provides a cause of action against the federal government." Defs.' Reply to Mot. for Summ. J. 38.

Similar to the issues discussed in Sections I.C, II.C, and II.D, the November 2016 Order extensively covered this legal argument, and the Court finds no need to revisit its analysis based on the nearly identical arguments in this motion. *See Juliana*, 217 F. Supp. 3d at 1252-1261. The Court does not find that its previous order, holding that the public trust doctrine is deeply rooted in our nation's history and that plaintiffs' claims are viable was clearly

18. This analysis applies with equal force to all of the issues raised in federal defendants' motion for summary judgment.

erroneous. *Id.* at 1259, 1261. There have been no changes in the factual record or legal authority that would justify a different outcome given the current record and the fact that the arguments presented by federal defendants in this motion are substantively the same, the Court declines to revisit its previous ruling. Genuine issues of material fact remain as to the specific allegations made by plaintiffs. The application of the public trust doctrine to these claims would be better served with a full factual record to help guide this Court and any reviewing courts.

F. *Plaintiffs' Remaining Claims*

In their motion for summary judgment, federal defendants state that "[t]his Court's order [denying the motions to dismiss] did not address [federal d]efendants' arguments concerning [p]laintiffs' Equal Protection claim under the Fifth Amendment or Plaintiffs' Ninth Amendment Claim." Defs.' Mem. of Law in Supp. of Mot. for Summ. J. 4. They assert that "the Equal Protection and Ninth Amendment claims are no longer at issue." *Id.* 24 n.8. Although federal defendants overstate their position with respect to the equal protection and Ninth Amendment claims, they are correct that the prior opinion and order was somewhat unclear with respect to those claims and some clarification is warranted.

The Court begins with plaintiffs' third claim for relief, which is pleaded as a freestanding claim under the Ninth Amendment. This claim is not viable as a matter of law. The Ninth Amendment "has never been recognized as independently securing any constitutional right, for

purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986). Federal defendants are therefore entitled to summary judgment on plaintiffs' third claim for relief.

Plaintiffs' equal protection claim requires a more substantive discussion, as it is linked to the allegation of fundamental rights violations.

When a federal court is presented with an equal protection claim, the first step is to "ascertain the appropriate level of scrutiny to employ[.]" *Aleman v. Glickman*, 217 F.3d 1191, 1197 (9th Cir. 2000). The default level of scrutiny is rational basis review, which affords governmental classifications "a strong presumption of validity." *Id.* at 1200 (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). The applicable analysis changes, however, when the plaintiff alleges either discrimination against a "suspect or semi-suspect class" or infringement of a fundamental right. *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1141 (9th Cir. 2011). A classification withstands rational basis review so long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 1201 (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)).

Plaintiffs contend that "posterity"—which they defined to include both unborn members of plaintiff "future generations" and minor children who cannot vote—is a suspect classification. They contend that, for

decades, federal defendants have prioritized present-day political and economic advantage over prevention of future environmental damage. Plaintiffs assert that young people and future generations will be disproportionately harmed by climate change because climate change and its effects are worsening over time. They assert that federal defendants' climate and energy policy treats "posterity" differently than other, similarly situated individuals, in violation of the Equal Protection Clause.

Judge Coffin recommended against recognizing "a new separate suspect class based on posterity." *Juliana*, 217 F. Supp. 3d at 1271 n.8. Although the Court stated in the introduction to the opinion and order that the Court was adopting Judge Coffin's findings and recommendation "as elaborated in this opinion," the Court expressly declined to decide whether youth or future generations were suspect classes. *Id.* at 1233 & 1249 n.7.

Both the Supreme Court and the Ninth Circuit have held that age is not a suspect class. *City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18 (1989); *United States v. Flores-Villar*, 536 F.3d 990, 998 (9th Cir. 2008). Plaintiffs argue that the Supreme Court has rejected only *old* age as a suspect classification, but that is not the case. *Stanglin* upheld "modest impairment of the liberty of teenagers"—specifically, 14- to 18-year-olds—in the form of an age-based restriction on entry to a dance hall. 490 U.S. at 28 (Stevens, J., concurring). *Flores-Villar* addressed the constitutionality of an immigration policy that treated United States citizen fathers differently depending on whether they lived in

the United States for at least five years after the age of fourteen.[19] 536 F.3d at 993. *Stanglin* and *Flores-Villar* both applied rational basis review to governmental action that discriminated against teenagers of a similar age to plaintiffs in this case. In both cases, that discrimination was found to be permissible if it had a rational basis.

Even if plaintiffs' suspect-class argument were not foreclosed by precedent, the Court would not be persuaded to break new ground in this area. *See Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) ("No cases have ever held, and we decline to hold, that children are a suspect class."). Suspect classification triggers strict scrutiny, a famously difficult test to survive. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 832, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (discussing strict scrutiny's somewhat-exaggerated reputation as "strict in theory, but fatal in fact"). Balancing competing interests is at the heart of executive and especially legislative decision-making, and it is the rare governmental decision that does not have *some* effect on children or posterity. Holding that "posterity" or even just minor children are a suspect class would hamstring governmental decision-making, potentially foreclosing even run-of-the-mill decisions such as prioritizing construction of a new senior center over construction of

19. *Flores-Villar* also upheld the immigration policy in question against the argument that it impermissibly treated mothers and fathers differently. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698, 198 L. Ed. 2d 150 (2017), abrogated *Flores-Villar*'s gender-discrimination holding but left untouched its age-discrimination holding.

a new playground or allocating state money to veterans' healthcare rather than to the public schools. Applying strict scrutiny to every governmental decision that treats young people differently than others is unworkable and unsupported by precedent.

However, the rejection of plaintiffs' proposed suspect class does not fully resolve their equal protection claim. As explained above, strict scrutiny is also triggered by alleged infringement of a fundamental right. *Wright*, 665 F.3d at 1141. Plaintiffs' equal protection claim rests on alleged interference with their right to a climate system capable of sustaining human life—a right the Court has already held to be fundamental. *Juliana*, 217 F. Supp. 3d at 1249-50; *see also id.* at 1271 n.8 ("Nonetheless, the complaint does allege discrimination against a class of younger individuals with respect to a fundamental right protected by substantive due process."); *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1430 (9th Cir. 1989) (stopping short of identifying a fundamental right but stating that "[h]uman life, itself a fundamental right, will vanish if we continue our heedless exploitation of this planet's natural resources"). Plaintiffs' equal protection and due process claims both involve violation of a fundamental right and, as such, must be evaluated through the lens of strict scrutiny, which would be aided by further development of the factual record.

III. *Request to Certify for Interlocutory Appeal*

Federal defendants seek certification for interlocutory appeal any portion of this opinion and order denying

their motions for judgment on the pleadings or summary judgment.

The final judgment rule gives the federal courts of appeal jurisdiction over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Congress created a narrow exception to this rule: a district judge may certify for appeal an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion" if "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" *Id.* § 1292(b). The requirements of § 1292(b) are jurisdictional, so a district court may not certify an order for interlocutory appeal if they are not met. *Couch v. Telescope, Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Congress did not intend district courts to certify interlocutory appeals "merely to provide review of difficult rulings in hard cases." *U.S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966). Rather, certification pursuant to § 1292(b) is reserved for "the most extraordinary situations." *Penk v. Or. State Bd. of Higher Educ.*, 99 F.R.D. 508, 509 (D. Or. 1982). Even when all three of § 1292(b)'s criteria are met, the district court retains unfettered discretion to deny a motion to certify for interlocutory review. *Mowat Constr. Co. v. Dorena Hydro, LLC*, 2015 WL 5665302, at *5 (D. Or. Sept. 23, 2015).

As a preliminary matter, the Court notes that to the extent federal defendants seek to certify for interlocutory appeal the legal rulings contained in the November 2016 Opinion and Order denying the motion to dismiss, the

Court already declined to certify those questions for interlocutory appeal. *Juliana*, 2017 WL 2483705, at *2. That denial is now the law of the case. The Court therefore denies federal defendants' request to certify the rulings on standing, the political question doctrine, the viability of public trust claims against the federal government, and the existence of a fundamental right to a climate system capable of sustaining human life.

As to the argument that plaintiffs' claims must proceed (if at all) under the APA, the "substantial ground for difference of opinion" standard is not met.

> To determine if a 'substantial ground for difference of opinion' exists under § 1292(b), courts must examine to what extent the controlling law is unclear. Courts traditionally will find that a substantial ground for difference of opinion exists where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented."

Couch, 611 F.3d at 631 (quoting 3 Federal Procedure, Lawyers Edition § 3:212 (2010)). As explained in Section I.B, *supra*, Supreme Court and Ninth Circuit precedent make it abundantly clear that plaintiffs may (and frequently do) challenge agency action outside the framework of the APA. Moreover, even if the "substantial ground for

difference of opinion" standard were met, certification of the APA issue in isolation would not materially advance the litigation. Instead, it would protract the litigation by requiring the parties to proceed on dual tracks.

The request for interlocutory appeal as to the issues raised in the summary judgment motion must also fail. As to standing, the issues presented are not purely legal questions, but rather implicate mixed questions of law and fact regarding all three prongs of the standing inquiry. As genuine issues of material fact remain, this case would benefit from the further development of the factual record both for this Court and any reviewing court on final appeal. This is also true for plaintiffs' state created danger theory, which directly implicates disputed factual questions.

The Court has already explained why it would be inappropriate to certify an appeal on the issue of the applicability of the APA. As to the legal questions involving in federal defendants' arguments regarding separation of powers, the viability of public trust claims against the federal government, and the existence of a due process right to a climate system capable of supporting human life, the Court has already denied certification on these issues.[20] Moreover, certifying a narrow piecemeal

20. Federal defendants argue in their motion that this Court's previous holding is at odds with certain out of circuit cases. The Court has addressed these concerns in this order and see no need to revisit the Court's analysis of those cases. Federal defendants also argue in a Notice to this the Court (doc. 330) that the Supreme Court's recent ruling denying their application implies that this

appeal on some of these legal issues would not materially advance this litigation, rather it would merely reshuffle the procedural deck and force the parties to proceed on separate tracks for separate claims, which is precisely what the final judgment rule seeks to prevent.[21] Accordingly, the requests to certify for interlocutory appeal made both in the motion for judgment on the pleadings and motion for summary judgment are denied.

CONCLUSION

Federal defendants' Motion for Judgment on the Pleadings (doc. 195) is GRANTED IN PART and DENIED IN PART as follows: the motion to dismiss

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Court should certify an interlocutory appeal. The Court has considered the concerns raised in the one paragraph order, both in this order and previous orders. The Court does not find that Order removes the Court's discretion to deny the request for interlocutory appeal.

21. The Supreme Court has cautioned that:

> [i]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.

Richardson Merrell, Inc. v. Koller, 472 U.S. 424, 440, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985) (internal quotations omitted)

Appendix J

President Trump as a defendant is granted, without prejudice, and is otherwise denied. Federal defendants' Motion for Summary Judgment (doc. 207) is GRANTED in part and DENIED in part as explained in this opinion. Federal defendants' requests to certify this opinion and order for interlocutory appeal are DENIED.

IT IS SO ORDERED.

Dated this 15th day of October 2018.

/s/ Ann Aiken
Ann Aiken
United States District Judge

APPENDIX K

139 S. Ct. 1

SUPREME COURT OF THE UNITED STATES

No. 18A65

UNITED STATES, *et al.*,

Applicants

v.

U.S. DISTRICT COURT FOR
DISTRICT OF OREGON

Filed: July 30, 2018

OPINION

The application for stay presented to Justice Kennedy and by him referred to the Court is denied.

The Government's request for relief is premature and is denied without prejudice. The breadth of respondents' claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion. The District Court should take these concerns into account in assessing the burdens of discovery and trial, as well as the desirability of a prompt ruling on the Government's pending dispositive motions.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-684
D.C. No. 6:15-cv-1517, Portland

IN RE: UNITED STATES OF AMERICA

UNITED STATES OF AMERICA, *et al.*;

Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON, EUGENE,

Respondent,

STATE OF ALABAMA,

Defendant,

XIUHTEZCATL TONATIUH M., through his
Guardian Tamara Roske-Martinez, *et al.*;

Real Parties in Interest,

THE NATIONAL ASSOCIATION
OF MANUFACTURERS, *et al.*;

Intervenors,

Appendix L

ENVIRONMENTAL JUSTICE CLINIC – UNIVERSITY OF MIAMI SCHOOL OF LAW, *et al.*;

Amici Curiae.

Filed: July 12, 2024

ORDER

Before: BENNETT, R. NELSON, and MILLER, Circuit Judges.

Judge Bennett, Judge R. Nelson, and Judge Miller all voted to deny the motion for rehearing or reconsideration en banc. Dkt. No. 27.1. The motion was distributed to the full court on June 20, 2024, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The motion for rehearing or reconsideration en banc is DENIED. The motion to vacate the May 1, 2024 order and recall the mandate, Dkt. No. 26.1, is also DENIED.